Court, U.S.
FILED
JUL 29 1987
JOSEPH F. SPANIOL, JR.
CLERK

87-174

No. 87-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

EDWARD O. TURNER,
Petitioner,

v.

ELISE D. MCINTOSH, SUSAN C. SORRELLS, ODESSA HOLLIS, ANN E. KENNEDY, JOANN SCHERBRING, CASPAR W. WEINBERGER, Secretary of Defense, and JOHN O. MARSH, JR., Secretary of the Army,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

WALTER H. FLEISCHER
Counsel of Record
ISAAC N. GRONER
COLE AND GRONER, P.C.
1615 L Street, N.W.
Washington, D.C. 20036-5602
(202) 331-8888
Counsel for Petitioner

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Does *Bush* v. *Lucas*, 462 U.S. 367 (1983), preclude a *Bivens* suit by federal employees based on the allegation that a federal personnel officer interfered with their pursuit of complaints that they should have received promotions?

2. Do federal employees who have available and have pursued established administrative and judicial remedies for their claims that they were denied promotions due to race and age discrimination have a cause of action based directly on the Constitution against an individual federal officer involved in reviewing the promotion decisions?

3. May a *Bivens* cause of action be judicially created on the theory that employees have a property interest in agency procedural regulations and in their claims, and that any destruction of evidence relating to their claims therefore violates that property interest?

4. May federal employees be held individually liable for damages under *Bivens* for interfering with the processing of claims which the District Court has found to have no merit or which remain for further adjudication against the United States?

PARTIES TO THE PROCEEDINGS

Petitioner Edward O. Turner was a Defendant in the District Court, and Appellant in the Court of Appeals for the Eighth Circuit.

Respondents Elise D. McIntosh, Susan C. Sorrells, Odessa Hollis, Ann E. Kennedy and JoAnn Scherbring were Plaintiffs in the District Court, Appellees in the Court of Appeals as to the portions of the decision which is the subject of this Petition, and Appellants in the Court of Appeals as to other portions of the case.

Respondents Caspar W. Weinberger and John O. Marsh were Defendants in their official capacities in the District Court, and Appellees in the Court of Appeals. They are nominal Respondents in this Court.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
OPINIONS AND JUDGMENT BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	8
I. THE JUDGMENT THAT THE CONSTITUTION CREATED THIS CAUSE OF ACTION MERITS REVIEW BY THIS COURT, PARTICULARLY BECAUSE IT CONFLICTS WITH DECISIONS OF THIS COURT, CONSPICUOUSLY *BUSH* v. *LUCAS*, 462 U.S. 367 (1983), AND *PARRATT* v. *TAYLOR*, 451 U.S. 527 (1981)	9
II. THE EIGHTH CIRCUIT MISAPPLIED THE QUALIFIED IMMUNITY STANDARDS, AS IT DID IN *ANDERSON* v. *CREIGHTON*, 483 U.S. —— (1987)	14
III. THE EIGHTH CIRCUIT'S PERMITTING OF DAMAGES IN A *BIVENS* SUIT WITHOUT A TRADITIONAL SHOWING OF CAUSATION IS IMPROPER AND WARRANTS REVIEW	18
CONCLUSION	19

TABLE OF AUTHORITIES

Cases: Page

Anderson v. Creighton, 483 U.S. ——, 107 S. Ct. 3034 (1987) 8, 14, 15, 16
Barr v. Matteo, 360 U.S. 564 (1959) 16
Beitzell v. Jeffrey, 643 F.2d 870 (1st Cir. 1981) 15
Bigby v. City of Chicago, 766 F.2d 1053 (7th Cir. 1985), *cert. denied*, 474 U.S. 1056 (1986) 15
Birnbaum v. United States, 588 F.2d 319 (2d Cir. 1978) 11
Bishop v. Wood, 426 U.S. 341 (1976) 10
Bivens v. Six Unknown Narcotics Agents, 403 U.S. 388 (1971) ..... *passim*
Braun v. United States, 707 F.2d 922 (6th Cir.), *cert. denied*, 464 U.S. 991 (1983) 12
Bush v. Lucas, 462 U.S. 367 (1983) 4, 8, 9, 10, 16, 19
Butz v. Economou, 438 U.S. 478 (1978) 9, 16, 17
California v. Trombetta, 467 U.S. 479 (1984) 13
Carey v. Piphus, 435 U.S. 237 (1978) 13
Dow Chemical Co. (U.K.) v. S.S. Giovannella D'Amico, 297 F. Supp. 699 (S.D.N.Y. 1969) 12
Goodisman v. Lytle, 724 F.2d 818 (9th Cir. 1984) 15
Gregoire v. Biddle, 177 F.2d 579 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950) 18
Harlow v. Fitzgerald, 457 U.S. 800 (1982) 16
Hatahley v. United States, 351 U.S. 173 (1956) 11
Hudson v. Palmer, 468 U.S. 517 (1984) 13
Kotarski v. Cooper, 799 F.2d 1342 (9th Cir. 1986), *petition for cert. filed*, 55 U.S.L.W. 3861 (U.S., May 13, 1987) (No. 86-1813) 10, 11
Lehman v. Weiss, 454 U.S. 807 (1981), *vacating and remanding*, 642 F.2d 265 (9th Cir. 1981), *opinion on remand*, 676 F.2d 1320 (9th Cir. 1982) 14
Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982) 14, 15
McDonnell Douglas Co. v. Green, 411 U.S. 792 (1983) 18
McIntosh v. Weinberger, 617 F. Supp. 107 (E.D. Mo. 1984) 2, 4
McIntosh v. Weinberger, 810 F.2d 411 (8th Cir. 1987) 1

TABLE OF AUTHORITIES—Continued

	Page
Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950)	14, 15
Parratt v. Taylor, 451 U.S. 527 (1981)	8, 9, 13
Paul v. Davis, 424 U.S. 693 (1976)	13
Pinar v. Dole, 747 F.2d 899 (4th Cir. 1984), *cert. denied*, 471 U.S. 1016 (1985)	12
Rodriguez-Mora v. Baker, 792 F.2d 1524 (11th Cir. 1986)	14
Rogers v. Exxon Research and Engineering Co., 550 F.2d 834 (3d Cir. 1977), *cert. denied*, 434 U.S. 1022 (1978)	12
United States v. Augenblick, 393 U.S. 348 (1969)	13
United States v. Loud Hawk, 628 F.2d 1139 (9th Cir. 1979) (*en banc*), *cert. denied*, 445 U.S. 917 (1980)	13
Statutes and Regulations:	
5 U.S.C. § 1206(b)(3)	12
§ 1206(b)(4)	12
§ 1206(c)(1)(B)	12
§ 2302(b)(2)	12
§ 2302(b)(4)	12
§ 2302(b)(11)	12
28 U.S.C. § 1254(1)	2
§ 1346(b)	11
29 U.S.C. § 633a	11
42 U.S.C. § 1983	13
§ 2000e-16	11
5 C.F.R. § 771.301	11
29 C.F.R. § 1607.4D	12
The Department of the Army Grievance System, C4, AR 690-700	11
Rule:	
F.R.Civ.P. 37(b)	12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-

EDWARD O. TURNER,

Petitioner,

v.

ELISE D. MCINTOSH, SUSAN C. SORRELLS, ODESSA HOLLIS, ANN E. KENNEDY, JOANN SCHERBRING, CASPAR W. WEINBERGER, Secretary of Defense, and JOHN O. MARSH, JR., Secretary of the Army,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Edward O. Turner petitions for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit.

OPINIONS AND JUDGMENT BELOW

The Opinion of the United States Court of Appeals for the Eighth Circuit (App. 1a-45a) and its Judgment (App. 72a) were entered on January 14, 1987.[1] The Opinion is reported at 810 F.2d 1411. The Opinion of the United States District Court for the Eastern District of Missouri of May 24, 1984, denying summary judgment

---

[1] "App." refers to the Appendix to this Petition. "Tr." refers to the transcript of the trial.

to Petitioner Turner (App. 46a-51a) is reported at 617 F. Supp. 107. The Opinion of that Court of July 12, 1985, on the portion of this suit seeking relief against the Defendants in their official capacities (App. 58a-68a), is not reported.

JURISDICTION

The Opinion and Judgment of the United States Court of Appeals for the Eighth Circuit were entered on January 14, 1987. A timely Petition For Rehearing With Suggestion For Rehearing *En Banc* was denied by Order of April 9, 1987 (App. 73a).

By Order of July 1, 1987, Mr. Justice Blackmun extended the time for filing a petition for a writ of certiorari until July 29, 1987.

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

Relevant portions of the Fifth Amendment to the United States Constitution, and provisions of Title 5, United States Code, and of the Department of the Army's Grievance Regulations appear in the Appendix, at pp. 74a-104a.

STATEMENT OF THE CASE

This would be a run of the mine, ordinary race and age discrimination suit, pursued unsuccessfully, but for the unprecedented claims for damages successfully asserted against Petitioner Turner in his individual capacity. His involvement, and no discrimination is alleged against him, came about as follows.

In April 1981, five civilians employed by the Department of the Army in St. Louis, Missouri, complaining of failures to be promoted because of alleged improprieties in the process by which selections were made for five positions at the Army Automated Logistics Management

Activity ("ALMSA") in St. Louis, caused Congressional inquiries to be made to the Army Materiel Development and Readiness Command ("DARCOM"), in the Washington, D.C., area. Those Congressional inquiries were forwarded to the Troop Support and Aviation Materiel Readiness Command ("TSARCOM") in St. Louis, which handled personnel matters for ALMSA. DARCOM asked TSARCOM to "reconstruct" the personnel action so that it could respond to the Congressional inquiries (Pl. Ex. 10-B).

Turner was the newly arrived Deputy Civilian Personnel Officer at TSARCOM. He was chosen to carry out this process, because he had just arrived, had not been involved in the original promotion actions, and did not know any of the people involved (Tr. 1-47, 4-157, 4-202). Turner then appointed Francis "Bud" Steins and Valeda Henson to do what had been requested to respond to the Congressional inquiries. After they reported what they had done, Turner caused other subordinates to redo a portion of their work. His main reason for so doing was that Steins and Henson had misconstrued their function as reviewing *both* the minimum qualifications of the candidates *and* their rating and relative standing; and they created another panel of experts for the latter purpose; whereas Turner had not intended Steins and Henson to perform the latter function, since the Congressional inquiry had related to the minimum qualifications only (Tr. 4-158 to 4-161, 4-168, 4-169). Both Steins' and Henson's work, and that of the succeeding group, consisted of reviewing qualifications set out on personnel forms; it did not entail interviewing applicants for the positions (Tr. 2-39).

The results of the succeeding personnel officials' work, but not the Steins-Henson product, was transmitted to DARCOM. After DARCOM responded to the Congressional inquiries, Turner caused the papers relating to the Steins-Henson work, which had not been placed in

any official file, and were sitting in his office, to be destroyed (App. 11a, Tr. 1-53). After receiving TSARCOM's response, DARCOM did not request it to set up a panel to consider the relative standing of the candidates (Tr. 4-177, 4-221, 4-222).

While the "reconstruction" was ongoing, on June 11, 1987, Plaintiffs filed formal discrimination complaints. Turner testified that he had been unaware of those complaints, which were handled at a level far below his, when he decided not to use the Steins-Henson materials (Tr. 4-183 to 4-184).

This suit had two main components: claims resting on allegations of discrimination based on race, national origin and age, and of retaliation, brought against the Secretaries of Defense and Army, and Turner, in their official capacities; and claims brought against Turner in his individual capacity, under *Bivens* v. *Six Unknown Narcotics Agents*, 403 U.S. 388 (1971). The gist of the complaint against Turner in his individual capacity was that he had destroyed the Steins-Henson documents. Plaintiffs claimed that the documents were favorable to them and might have resulted in their obtaining relief from the original promotion decisions (in which Turner had not participated).

Turner's motion for summary judgment, based on this Court's decision in *Bush* v. *Lucas*, 462 U.S. 367 (1983), a lack of deprivation of a "property interest" supporting a *Bivens* claim, and an assertion of qualified immunity, was denied. 617 F. Supp. 107 (E.D. Mo. 1984), App. 46a-51a. The District Court distinguished between the underlying claims and alleged tortious interference with their processing, holding that *Bush* did not preclude a *Bivens* suit based on the latter (*id.*).

The trial Court severed the claim against Turner from the underlying discrimination claims, and over his objections, the claim against him was tried first to a jury. Verdicts in favor of each of the Plaintiffs, totalling

$110,000, of which $50,000 was for compensatory damages, and $60,000 for punitive damages, were entered, on August 31, 1984.

Thereafter, the discrimination claims of three of the Plaintiffs were tried to the Judge, the claims of the other two having been dismissed because of the pendency of administrative proceedings (App. 20a-21a). On July 12, 1985, an opinion and judgment dismissing the claims of the three Plaintiffs were entered (App. 58a-69a). The District Judge found that "[b]asically, defendants showed that the persons selected [in lieu of plaintiffs] were viewed as having more detailed management experience, more education specifically geared toward the vacancy in question, and in some cases the specific skills required for the position" (App. 63a). It found no discrimination or retaliation against them (App. 64a-67a).

At the trial of the claim against Turner, the evidence covered such personnel matters as whether the term "reconstruct" meant redoing both parts of the process or only the evaluation of minimum qualifications, especially in the particular context; and whether a personnel regulation requiring officials to retain documents necessary for an "audit trial" encompassed ones generated by a review in response to a Congressional inquiry, and which were not in fact used, as contrasted to ones generated during the initial promotion action. There was sharply conflicting testimony on each point.

With respect to the conclusions of the Steins-Henson group, reflected in the destroyed documents, an equal employment opportunity officer had kept notes of its meeting; that document showed the panel's ranking of the best qualified candidates for the positions (Tr. 2-117 to 2-147; Pl. Ex. 27). The notes showed that the Steins-Henson group down-rated the successful applicants; and also rated only two of the Plaintiffs (Sorrells, Kennedy) among the "best qualified" applicants, though two others claimed to have heard that they also were so rated by

the Steins-Henson panel as well as the original one (Tr. 3-65, 3-103 to 3-105, 3-110). The last Plaintiff (Scherbring) apparently was considered not qualified by both groups (Tr. 3-127; Pl. Ex. 72). The group which succeeded the Steins-Henson group confirmed the original conclusions as to basic qualifications (App. 11a).

The original applications, on which all evaluations were made, were retained (Tr. 4-191, 4-192), and were available for administrative and judicial reviews of the correctness of the underlying actions. Two Plaintiffs (McIntosh, Sorrells) were able to persuade administrative officials (though not the District Court) that they had suffered discrimination (Tr. 3-26, 3-149, 3-150). Sorrells received one of the positions she had sought, with back pay (*id.*). McIntosh, shortly after the dissolution of the Steins-Henson panel, had taken a job with another federal agency at a two-grade promotion; by the time of trial she had been promoted another two grades. Asked how she had been damaged by the loss of records, she said that "if the records existed that there could have been a complete investigation of the issues at hand" (Tr. 3-31, 3-32). She added that she was continuing with her discrimination suit "as a matter of principle . . ." (Tr. 3-47).

The District Judge deliberately excluded from the trial of the claims against Turner all contentions concerning the correctness of the underlying personnel actions (Tr. 3-177 to 3-179). The focus of the trial was therefore solely on whether Turner had interfered with claims, which Plaintiffs' counsel admitted might have no merit (Tr. 5-40).[2]

---

[2] ". . . there is a moment in time for five people, five people who feel that they've been hurt. This may be wrong, they may not even have a claim, they may not have any claim whatsoever. Judge Limbaugh may find that they have no claim. We haven't reached that point . . ." (closing argument of Plaintiffs' counsel).

As noted, the jury returned a verdict in favor of all five Plaintiffs, totalling $110,000, of which $60,000 was for punitive damages. On August 31, 1984, the District Court entered judgment on the verdict (App. 52a-54a). Various post-trial motions were denied (App. 55a-57a, 70a-71a).

After the District Court had decided the discrimination claims adversely to the Plaintiffs, appeals were taken by Turner from the judgment against him and by Plaintiffs from the judgment dismissing their discrimination claims. The Eighth Circuit affirmed on both appeals. On Plaintiffs' appeal, it sustained the District Court's findings that the Government "had articulated a legitimate, non-discriminatory reason for the non-selection of the five plaintiffs, *i.e.*, that the selecting officials believed that the persons actually promoted were better qualified for the positions" (App. 28a).

On Turner's appeal, it held that Plaintiffs had clearly established property interests in both ALMSA's merit-promotion system and their EEO claims (App. 37a-38a); that there was "no room" to contend that his conduct did not deprive Plaintiffs of that interest (App. 39a), and hence "Turner was not entitled to qualified immunity" (App. 40a). It attempted to distinguish *Bush* on the grounds that the Plaintiffs could not appeal a failure to promote them to the Merit Systems Protection Board, and that they could not appeal *his* actions through a discrimination complaint, as they did not claim that *he* acted for discriminatory reasons (App. 41a). Thus it implicitly distinguished between the underlying claims and his processing of them. It asserted that the employees' right to complain to the Special Counsel of the Merit Systems Protection Board was an inadequate remedy (App. 42a).

Finally, notwithstanding the District Court's findings that the initial failure to promote was justified, the

Eighth Circuit stated that a reasonable jury could have found that had the Steins-Henson results been sent to DARCOM "the plaintiffs would have received the promotions they sought, or perhaps, some other favorable action" (App. 42a).

REASONS FOR GRANTING THE WRIT

This case presents fundamental and recurring Constitutional issues arising from suits resting ultimately on *Bivens* v. *Six Unknown Narcotics Agents*, 403 U.S. 388 (1971). These issues include whether this suit by federal employees complaining of personnel actions, for which there are established procedures and remedies, should have been dismissed because of " 'special factors counselling hesitation [in sustaining action based upon a cause of action alleged to be created by the Constitution itself] in the absence of affirmative action by Congress' "—the standard forestalling damage awards against a federal official in his individual capacity which this Court elucidated in *Bush* v. *Lucas*, 462 U.S. 367, 378, 388 (1983), quoting *Bivens*, *supra*, 403 U.S. at 396.

The extent to which the existence of other pertinent procedures and remedies should inhibit and preclude the judicial creation of a cause of action under the Constitution also is an issue worthy of further discussion by this Court. The need therefor is demonstrated by the conflict on this score between the decision below and *Parratt* v. *Taylor*, 451 U.S. 527 (1981).

This case also presents basic issues, warranting further guidance from this Court to the lower Courts, with respect to the parameters of the qualified immunity which should be accorded federal officials in this expansive group of cases. On this issue, the decision below is inconsistent with *Anderson* v. *Creighton*, 483 U.S. ——, 107 S.Ct. 3034 (1987). Because of the marked lack of clarity in the discussion below, and the confusion and inconsistency of analysis and results with respect to the

definition and application of immunity principles, it also appears timely and appropriate to consider whether *Butz* v. *Economou*, 438 U.S. 478 (1978), should be more severely limited.

Moreover, the spectacle of subjecting a federal employee individually to damages for conduct in relation to employees' claims ultimately judged to be baseless merits review by this Court. Whether a federal employee may be so held liable based on nothing more than a sequential stringing of speculations, such as those put forward by Plaintiffs and accepted by the Court below, is likewise an issue of general importance.

I. THE JUDGMENT THAT THE CONSTITUTION CREATED THIS CAUSE OF ACTION MERITS REVIEW BY THIS COURT, PARTICULARLY BECAUSE IT CONFLICTS WITH DECISIONS OF THIS COURT, CONSPICUOUSLY *BUSH v. LUCAS*, 462 U.S. 367 (1983), AND *PARRATT* v. *TAYLOR*, 451 U.S. 527 (1981).

A. The judgment below creating a judge-made remedy for federal employees alleging Constitutional violations affecting their claims of entitlement to promotions in the federal civil service can hardly be reconciled with *Bush* v. *Lucas*, 462 U.S. 367 (1983). The Courts below simply disregarded the holding of this Court (462 U.S. at 368):

> "Because such claims arise out of an employment relationship that is governed by comprehensive procedural and substantive provisions giving meaningful remedies against the United States, we conclude that it would be inappropriate for us to supplement that regulatory scheme with a new judicial remedy."

The Courts below failed to recognize, as this Court declared in *Bush*, *supra*, at 380-381, that inasmuch as the case involved "the relations between the government and its employees, the ultimate question from the merits of this case may appropriately be characterized as one of

'federal personnel policy'." The Courts below should have dismissed the suit against Turner because "the relationship between the Federal Government and its Civil Service Employees was a special factor counselling against the judicial recognition of a damages remedy under the Constitution." *Bush, supra,* 462 U.S. at 372.

The Court below presumed it could isolate Turner's conduct from the Civil Service context in which it had entirely occurred and found that there was no remedy for that conduct, viewed in utter isolation (App. 40a-42a). This view that new judicial remedies should be created because they afford fuller relief than established remedies cannot be harmonized with *Bush*, for this Court in *Bush* assumed not only that Constitutional rights had been violated by an adverse personnel action, but also that "Civil Service remedies were not as effective as an individual damages remedy and did not fully compensate [the federal employee] for the harm he suffered." 462 U.S. at 372 (footnote omitted).

This case is not the only one in which a lower court has failed to follow the teaching of *Bush.* A petition for a writ of certiorari is pending (O.T. 1986, No. 1813) in another such case, *Kotarski* v. *Cooper,* 799 F.2d 1342 (9th Cir. 1986). Both Court of Appeals decisions miss the pervasive principle reemphasized in *Bush* that the power of the Federal Courts to create new remedies for damage claims based on the Constitution is not properly invoked "to review the multitude of personnel decisions that are made daily by public agencies." *Bishop* v. *Wood,* 426 U.S. 341, 349 (1976). Instead, especially in view of the extensive provisions of statute and regulation governing personnel matters, that entire area—not just parts of it—is one in which *Bivens* suits may not be allowed "in the absence of affirmative action by Congress," *Bush, supra,* 462 U.S. at 378, 388. No such action is involved here, any more than in *Bush.*

B. Permitting this suit to proceed is even less justifiable than in *Kotarski*, where the plaintiff had no remedy other than a *Bivens* suit. Here, quite contrary to the view of the Court below, a variety of procedures was available to give Plaintiffs effective remedies for any wrongful denial of promotions because of race or age discrimination; and as one facet of that broad underlying claim, on their claim that they were adversely affected in pursuing the basic claim by Turner's destruction of papers. They could, and did, proceed administratively and in court under equal employment opportunity law; indeed, they received a *de novo* trial (42 U.S.C. § 2000e-16; 29 U.S.C. § 633a; App. 16a-17a).

Those proceedings offered remedies both for any failure to promote based on race or age, and for any retaliatory actions. The effectiveness of those remedies is demonstrated by the fact that one of the Plaintiffs obtained relief administratively under these statutes, and another would have, but for the fact that she had already received two two-grade promotions in the meantime. If Plaintiffs felt they had a claim falling outside the coverage of those laws, the Army's detailed grievance procedure, through its United States Army Civilian Review Agency ("USACARA"), offered relief (*see* Army Grievance System C4, AR 690-700, App. 89a). Almost every federal agency must, and does, have such grievance regulations. *See* 5 C.F.R. § 771.301.

In addition, Plaintiffs who claim they were deprived of property rights by Government action violating the Fifth Amendment—the claims sustained by the Courts below as otherwise without remedy—may well be able to invoke the Federal Tort Claims Act, 28 U.S.C. § 1346(b). *See Hatahley* v. *United States*, 351 U.S. 173 (1956); *Birnbaum* v. *United States*, 588 F.2d 319 (2d Cir. 1978).

Government employees who claim that they have been subject to "prohibited personnel practices"—a term in-

cluding unlawful interference with the exercise of appeal rights, *see* 5 U.S.C. § 2302(b)(2), (4) and (11)—also may complain to the Special Counsel of the Merit Systems Protection Board. Other Circuits have relied on that channel of relief to bar a *Bivens* suit, even where the affected employees did not have the array of other remedies available to Respondents here. *E.g.*, *Braun* v. *United States*, 707 F.2d 922, 926 (6th Cir.), *cert. denied*, 464 U.S. 991 (1983); *Pinar* v. *Dole*, 747 F.2d 899, 905 (4th Cir. 1984), *cert. denied*, 471 U.S. 1016 (1985).[3]

Furthermore, well-settled remedies exist for the loss or destruction of documents in any adjudicative proceedings. A court or administrative board may presume facts against a party,[4] or grant sanctions including the striking of defenses.[5] Oddly, the Eighth Circuit applied the presumption against Turner (App. 43a), while failing to see that its availability against the Government undermines the conclusion that there was no adequate remedy save a *Bivens* action.

---

[3] The Eighth Circuit misunderstood, and underestimated, the powers of the Special Counsel, when it asserted (App. 42a) that "in any action filed by the Special Counsel the MSPB is authorized to take disciplinary action against Turner, but not to award any affirmative relief to the injured employee. 5 U.S.C. § 1207(b)." In fact, the Special Counsel can force the head of an agency to report on the corrective action taken in response to findings of a prohibited personnel practice, 5 U.S.C. § 1206(b)(3) and (b)(4), and if dissatisfied, can petition the MSPB, which "may order such corrective action as the Board considers appropriate . . . ." 5 U.S.C. § 1206(c)(1)(B).

[4] *See, e.g.*, *Rogers* v. *Exxon Research and Engineering Co.*, 550 F.2d 834, 843 (3d Cir. 1977), *cert. denied*, 434 U.S. 1022 (1978); *Dow Chemical Co. (U.K.)* v. *S.S. Giovannella D'Amico*, 297 F. Supp. 699, 701 (S.D.N.Y. 1969). The presumption is even built into regulations in the equal employment opportunity field. *See* 29 C.F.R. § 1607.4D.

[5] *E.g.*, F.R.Civ.P. 37(b).

The decision below indeed expands the "constitutionalization" of disputes, and hence the reach of *Bivens*, not only in its willingness to find property rights in regulations, but in its determination to treat the loss of records as a Constitutional issue. This is an extreme if not unprecedented holding in a civil case, for generally loss of evidence is treated as an evidentiary problem. Even in the criminal context, "destruction of evidence becomes a problem of constitutional dimensions only in the most extreme case." *United States* v. *Loud Hawk*, 628 F.2d 1139, 1153 (9th Cir. 1979) (*en banc*) (concurring opinion), *cert. denied*, 445 U.S. 917 (1980), as where a deliberate destruction makes any trial of the underlying case a mockery. *Cf. United States* v. *Augenblick*, 393 U.S. 348, 356 (1969); *see also generally California* v. *Trombetta*, 467 U.S. 479, 486 (1984).

C. Because of the existence of the remedies and procedures, and the other considerations discussed above, the decision below is contrary to the strictures of *Parratt* v. *Taylor*, 451 U.S. 527 (1981), and *Hudson* v. *Palmer*, 468 U.S. 517, 531-533 (1984). In *Parratt*, this Court held that in a suit under 42 U.S.C. § 1983, a plaintiff may not sue individual Government employees for a taking of their property in violation of the Fifth Amendment if other remedies provide due process for the taking. In *Hudson*, one of the allegations was that "legal papers" of a prisoner were maliciously seized, 468 U.S. at 535, which if true could hinder his presenting claims; but this Court reached the same conclusion, that available remedies undermined treating those allegations as of Constitutional rank. The Constitution is not to be interpreted, as did the Courts below, as a " 'font of tort law to be superimposed upon whatever systems may already be administered' " for remedying the alleged wrong. *Parratt*, *supra*, 451 U.S. at 544, citing *Paul* v. *Davis*, 424 U.S. 693, 701 (1976).

Other Court of Appeals decisions in *Bivens* suits have accepted this principle, from which the Courts below shied. *See Rodriguez-Mora* v. *Baker*, 792 F.2d 1524, 1527 (11th Cir. 1986); *cf. Lehman* v. *Weiss*, 454 U.S. 807 (1981), *vacating and remanding*, 642 F.2d 265 (9th Cir. 1981), for further consideration under *Parratt, opinion on remand*, 676 F.2d 1320 (9th Cir. 1982). Whether the lower Courts should transform normal legal categories to Constitutional questions in order to grant remedies additional to the traditional ones, as was done below, is worthy of review by this Court.

II. THE EIGHTH CIRCUIT MISAPPLIED THE QUALIFIED IMMUNITY STANDARDS, AS IT DID IN *ANDERSON* v. *CREIGHTON*, 483 U.S. —— (1987).

A. *Anderson* v. *Creighton*, 483 U.S. ——, 107 S.Ct. 3034 (1987), issued after the decision below, illuminates errors in the analysis below of issues of qualified immunity and proof of a Consititutional right, errors which militate for consideration and correction by this Court.

The judgment below cannot be squared with the *Anderson* holding that a federal officer should not be held personally liable if he reasonably could have believed that his conduct did not violate Constitutional standards. In claiming immunity, Turner urged that he could not reasonably have known that there was a property interest of Constitutional dimension in claims filed, until the opinion of this Court in *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422 (1982). While the Courts below acknowledged that *Logan* was indeed the first occasion where the existence of such a right was clearly enunciated, they reasoned (App. 38a-39a) that since *Logan* held that its conclusion on the point followed from the longstanding decision in *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), the *Logan* holding was sufficiently foreseeable to hold Turner individually liable. *Mullane* is best known for its holding that one with a claim against

a trust fund must be notified before its defeasance. However, merely to recite that *Mullane* established some due process right in a claim does not show that a reasonable layman objectively should have anticipated that his handling of papers in a personnel dispute could give rise to the same kind of claim and impose individual liability for allegedly violating Constitutional rights of the employee. Especially is this so when both *Logan* and *Mullane* addressed the extinction of claims, not irregularities in their processing. Obviously, Turner did not cut off Plaintiffs' claims, as did the public officials in *Logan* and *Mullane*. The decision below, in short, makes the same overly facile leap, from a very general proposition to a specific situation that is far different in character, that this Court invalidated in *Anderson*.

Moreover, when the underlying claim of a public employee is that he is entitled to a promotion, rather than one involving his right to be employed at all as in *Logan*, it is quite unreasonable to hold that the claim is so clearly of Constitutional stature that Turner must have known he was trammeling Constitutional rights. Indeed, the Eighth Circuit's premise that certain property rights inhere in the Army's procedures for processing promotion claims (App. 37a-38a) is in direct conflict with the decisions of other Courts of Appeals holding that a Government employee does not acquire Constitutionally-protected rights in promotion merely because the Government promulgates guidelines and procedures for selecting among candidates. *See Bigby* v. *City of Chicago*, 766 F.2d 1053, 1056-1057 (7th Cir. 1985), *cert. denied*, 474 U.S. 1056 (1986); *Goodisman* v. *Lytle*, 724 F.2d 818, 820-821 (9th Cir. 1984); *Beitzell* v. *Jeffrey*, 643 F.2d 870, 876 (1st Cir. 1981).

Moreover, it was reasonable for Turner to conclude that the papers he destroyed were not necessary. The underlying facts relevant to the merits of who should have been promoted were all available without those

papers, so that that determination could be easily reviewed. Indeed, the Steins-Henson panel, or another one, could simply have been reconstituted to review and assess the same evidence again (Tr. 1-84, 2-126, 2-127). Furthermore, the Government offered to stipulate favorably to the Plaintiffs the allegedly "lost" facts, consisting solely of the opinions of certain persons as to the underlying dispute (App. 104a). In any event, those facts, including exact scores which the Steins-Henson panel gave applicants considered best qualified, were still available at trial from the notes of an observer who testified (Tr. 2-136 to 2-146),[6] combined with the testimony of all the persons who had comprised the Steins-Henson panel (*e.g.*, Tr. 2-94, 2-108, 2-122).

B. In the sixteen years since *Bivens* was decided, this Court on many occasions has refined, limited, or redefined the scope of suits permissible under that seminal case. A prominent example is the development of qualified immunity doctrine related in the decision below (App. 32a-34a), and most recently exemplified by *Anderson*, *supra*.

The bringing of *Bivens* cases goes on unabated; the Civil Division of the Department of Justice advises us that more than 1,000 such cases are filed annually in the federal courts. There has been no decrease since the decisions of this Court in *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982), and *Bush*. To Petitioner this history suggests that a re-examination of some major premises in this area may be warranted. In particular, we submit that denying officials the absolute immunity of *Barr* v. *Matteo*, 360 U.S. 564 (1959), whenever a plaintiff can cast his complaint in Constitutional terms should no longer be considered justifiable. This was the position of the four Justices dissenting in part in *Butz* v. *Economou*, 438 U.S.

---

[6] The observer testified that the notes were an accurate representation of the panel results (Tr. 2-146).

478, 517-530 (1978). Petitioner submits that limiting the immunity to its qualified form can be justified, if at all, only where the plaintiff has no other reasonable means of redress.

The justification for the contrary position is essentially punitive: that persons who could get adequate redress through proceedings against the Government itself should nonetheless be able to maintain *Bivens* suits to provide oversight over arguably unconstitutional actions of federal officials and to punish them if such actions took place. *Butz, supra*, 438 U.S. at 505-507.

But Congress has not passed laws appointing a multitude of disgruntled persons as private attorneys-general for such a purpose, and the costs of such proceedings in terms of time, money and loss of morale among federal officials are excessive. The scrutiny and punishment are erratic; and the latter may be disproportionate, turning on whether the official happens to have been in a position where his actions affected a number of persons. There are now institutional means by statute—such as the Special Counsel provisions—to control Constitutional excesses by officials; moreover, it is reasonable to assume that when an official causes the Government great loss by unconstitutional actions, his superiors may invoke discipline without the aid of private plaintiffs.

The majority in *Butz* noted that "*Bivens* could be a vital means of providing redress for persons whose constitutional rights have been violated. The barrier of sovereign immunity is frequently impenetrable." 438 U.S. at 504. But where that barrier is not impenetrable, the rationale for restricting the immunity disappears. It will be recalled that *Bivens* itself was a "damages or nothing" case. 403 U.S. at 410 (Harlan, J., concurring).

In sum, where there are other substantial remedies for the plaintiffs, even if they are not perfect, there also should be absolute immunity for actions within the outer perimeter of a federal official's duties.

III. THE EIGHTH CIRCUIT'S PERMITTING OF DAMAGES IN A *BIVENS* SUIT WITHOUT A TRADITIONAL SHOWING OF CAUSATION IS IMPROPER AND WARRANTS REVIEW.

To allow imposition of more than nominal damages without a clear-cut showing that the alleged wrong caused compensable harm is to magnify the *in terrorem* effect which may attend any damage suit against a federal official in his individual capacity, *see Gregoire* v. *Biddle*, 177 F.2d 579, 581 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950). It rewards and invites suits brought primarily for vindictive reasons. The Eighth Circuit has demonstrably failed to require of the Plaintiffs proof of damages even up to the standards applied under civil rights laws. *E.g.*, *McDonnell Douglas Co.* v. *Green*, 411 U.S. 792, 800-802 (1983); *Carey* v. *Piphus*, 435 U.S. 237 (1978).

That the Eighth Circuit did so fail is manifest. At every stage there is a lack of the requisite proof: there was none to support the speculation that the destruction of the second panel's figures made any difference in the ultimate result. Rather, the District Court itself ruled that the underlying facts as to Respondents' employment background, which had been fully retained, showed that they were not entitled to the promotions sought. Likewise, the supposition that had the writings of the second panel been retained, they would have persuaded Army officials in Washington, D.C., to take action favorable to Respondents which neither the cognizant personnel officials in St. Louis (including Mr. Turner), nor the District Court thought was warranted, is based on nothing whatsoever. The same DARCOM officials neither called upon TSARCOM to forward a re-ranking of applicants when none was sent, nor were moved to give relief when the Office of Personnel Management criticized the promotion process (App. 13a-14a). As Turner pointed out, the practice was not even to submit such materials to the Washington, D.C., officials (Tr. 4-161 to 4-163).

The complete departure below from normal causal damage analysis is shown by the fact that even the Plaintiff Hollis, whose rating apparently was lowered by the second panel, was allowed to recover against Turner; thus $20,000 in damages, compensatory and punitive, was assessed against him for precluding *unfavorable* information about that Plaintiff going forward. Another $20,000 was assessed in favor of Plaintiff McIntosh, who was proceeding "as a matter of principle" after being promoted four grades. Likewise Turner was assessed damages, totalling $45,000, in favor of the two Plaintiffs, Kennedy and Scherbring, whose discrimination claims remain open, and who therefore may be made whole in proceedings against the Government. The last $25,000 was assessed in favor of Plaintiff Sorrells, who had received relief administratively, and was found by the Court to be entitled to no more.

This extension of damage remedies against Government officials in their individual capacity should not be permitted to prevail as Constitutional law without the scrutiny of this Court. The nature and variety of the issues and errors embedded in the decision below stamp this case as an appropriate vehicle for further clarification of the claims permissible under *Bivens* and further direction to the lower Courts to comply with *Bush* and the other pertinent decisions of this Court.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

WALTER H. FLEISCHER
Counsel of Record
ISAAC N. GRONER
COLE AND GRONER, P.C.
1615 L Street, N.W.
Washington, D.C. 20036-5602
(202) 331-8888
Counsel for Petitioner

Supreme Court, U.S.
FILED
JUL 29 1987
JOSEPH F. SPANIOL, JR.
CLERK

87-174

No. 87-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

EDWARD O. TURNER,
Petitioner,

v.

ELISE D. MCINTOSH, SUSAN C. SORRELLS, ODESSA HOLLIS, ANN E. KENNEDY, JOANN SCHERBRING, CASPAR W. WEINBERGER, Secretary of Defense, and JOHN O. MARSH, JR., Secretary of the Army,
Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

WALTER H. FLEISCHER
Counsel of Record
ISAAC N. GRONER
COLE AND GRONER, P.C.
1615 L Street, N.W.
Washington, D.C. 20036-5602
(202) 331-8888
Counsel for Petitioner

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
Opinion of the United States Court of Appeals for the Eighth Circuit, January 14, 1987	1a
Memorandum and Order of the United States District Court for the Eastern District of Missouri, Denying Motion to Dismiss or For Summary Judgment, May 24, 1984	46a
Judgment on Count Four of the United States District Court for the Eastern District of Missouri, August 31, 1984	52a
Memorandum and Order of the United States District Court for the Eastern District of Missouri, Denying Supplemental Motion For New Trial or For Relief From Judgment, June 13, 1985	55a
Memorandum Opinion of the United States District Court for the Eastern District of Missouri, *re* Discrimination Claims, July 12, 1985	58a
Order of the United States District Court for the Eastern District of Missouri, July 12, 1985	69a
Order of the United States District Court for the Eastern District of Missouri, Denying Motion For Judgment Notwithstanding the Verdict or For A New Trial, August 5, 1985	70a
Order of the United States District Court for the Eastern District of Missouri, Denying Motion For Relief From Judgment, September 25, 1985	71a
Judgment of the United States Court of Appeals for the Eighth Circuit, January 14, 1987	72a
Order of the United States Court of Appeals for the Eighth Circuit, Denying Rehearing and Suggestion For Rehearing *En Banc*, April 9, 1987	73a
Constitutional, Statutory and Regulatory Provisions, excerpts from:	
Fifth Amendment, United States Constitution	74a
Title 5, United States Code	
§ 1206	74a
§ 2302	79a

TABLE OF CONTENTS—Continued

Page

Title 29, United States Code
§ 633a 85a
Title 42, United States Code
§ 2000e-16 ..... 87a
The Department of the Army Grievance System, C4, AR 690-700 ..... 89a
Offer to Stipulate Facts 103a

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 85-2023

ELISE D. MCINTOSH; SUSAN C. SORRELLS; ODESSA HOLLIS; ANN E. KENNEDY; and JOANN SCHERBRING, individually and as representatives of a class of individuals employed by the United States Army who have been denied promotional opportunities by reason of race, color, national origin, or age,

Appellants,

v.

CASPAR W. WEINBERGER, Secretary of Defense; JOHN O. MARSH, JR., Secretary of the Army; EDWARD TURNER, individually and in his capacity as Assistant Civilian Personnel Officer for Troop Support and Aviation Materiel Readiness Command, *Appellees.*

On Appeal from the United States District Court
for the Eastern District of Missouri

No. 85-2086

ELISE D. MCINTOSH; SUSAN C. SORRELLS; ODESSA HOLLIS; ANN E. KENNEDY; and JOANN SCHERBRING, individually and as representatives of a class of individuals employed by the United States Army who have been denied promotional opportunities by reason of race, color, national origin, or age,

Appellees,

v.

CASPAR W. WEINBERGER, Secretary of Defense; JOHN O. MARSH, JR., Secretary of the Army; EDWARD TURNER, individually and in his capacity as Assistant Civilian Personnel Officer for Troop Support and Aviation Materiel Readiness Command, *Appellants.*

On Appeal from the United States District Court
for the Eastern District of Missouri

Submitted: September 10, 1986
Filed: January 14, 1987

Before ARNOLD, Circuit Judge, BRIGHT, Senior Circuit Judge, and FAGG, Circuit Judge.

ARNOLD, Circuit Judge.

Plaintiffs Elise McIntosh, Susan Sorrells, Odessa Hollis, Ann Kennedy, and JoAnn Scherbring are current and former employees of the Automated Logistics Management Systems Activity (ALMSA), a branch of the United States Army located in St. Louis, Missouri. They brought suit in the District Court[1] alleging that discrimination based on race, national origin, and age had occurred in certain ALMSA promotion actions, in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-16, and the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 633a (Count I); that ALMSA officials had retaliated against them for filing Equal Employment Opportunity (EEO) complaints (Count II); that there had been systemic discrimination in ALMSA promotion practices and procedures, affecting a class of minority and older employees (Count III); and that individual defendant Edward Turner, an Army personnel official, had violated their due-process rights by concealing and destroying certain merit-promotion records (Count IV). The plaintiffs appeal from the District Court's adverse judgment on

---

[1] The Hon. Stephen N. Limbaugh, United States District Judge for the Eastern and Western Districts of Missouri.

Counts I through III, and defendant Turner appeals from the judgment entered on a jury verdict for the plaintiffs on Count IV. Except as to one issue that has become moot, we affirm on all counts.

I.

A.

As background to the particular facts and issues of this case, it is necessary to discuss in some detail the system of personnel administration under which the federal government operates. The great majority of civilian positions in the Executive Branch, including those in this case, are in the "competitive service" and are administered under regulations issued by the Office of Personnel Management, the federal government's central personnel agency. The basic authority of OPM is found in 5 U.S.C. §§ 1101 *et seq.* OPM issues government-wide regulations for use by other agencies and delegates to those agencies the authority to operate their own personnel programs within the limits of these regulations. OPM has the responsibility for overseeing agency personnel programs to ensure that its regulations are complied with.

Federal agency personnel administrators operate under a highly elaborate system of law and regulation. The basic statutes, found in Title 5 of the United States Code, define in general the responsibilities of the federal government as employer. Government-wide Civil Service Rules and Civil Service Regulations, promulgated by OPM and found in the Code of Federal Regulations, refine these principles and are binding on all agencies with employees in the competitive service. The Federal Personnel Manual (FPM), also published by OPM, contains the detailed day-to-day operating rules and is also binding on agencies. The FPM itself is further elaborated by FPM Supplements, which provide precise

standards for certain categories of actions, and FPM Bulletins, which give additional, temporary guidance on selected issues. The regulatory authority of OPM extends throughout the various levels of regulations which have been described above. In addition to this body of government-wide regulations, each agency publishes its own instructions. These are supplementary to the OPM regulations, and relate those regulations to the particular organizational context of the agency. In the Department of the Army, each headquarters-level command issues instructions for the guidance of local units within the command issues instructions for the guidance of local units within the command. In the present case, the headquarters command is the U.S. Army Materiel Development and Readiness Command (DARCOM). Its written instructions are applicable to the constituent organizations under its control ("local activities"). It shares with OPM the responsibility for supervising personnel administration within the local activities. ALMSA is a local activity within DARCOM. For its own purposes, it has negotiated with its employees certain local procedures which further define the discretion of management in personnel matters. Although ALMSA had its own promotion plan, its personnel operations were performed by the Troop Support and Aviation Materiel Readiness Command (TSARCOM), another Army activity in St. Louis.

The federal personnel system is permeated by reliance on merit system principles. These principles are set out at 5 U.S.C. § 2301, which includes the following language:

> (b) Federal personnel management should be implemented consistent with the following merit system principles:
>
> > (1) Recruitment should be from qualified individuals from appropriate sources in an endeavor

> to achieve a work force from all segments of society, and selection and advancement should be determined solely on the basis of relative ability, knowledge, and skills after fair and open competition which assures that all receive equal opportunity.
>
> (2) All employees and applicants for employment should receive fair and equitable treatment in all aspects of personnel management without regard to political affiliation, race, color, religion, national origin, sex, marital status, age, or handicapping condition . . . .
>
> (3) Equal pay should be provided for work of equal value . . . .

Much of the accumulated mass of federal personnel regulations is designed to enhance and protect these principles.

The promotion procedure at ALMSA, which is at issue here, is set up as follows: When a position vacancy arises, a personnel specialist consults with the supervisor over the position to determine the key performance requirements of the job. A crediting plan is assembled, which is to serve as a guide for the evaluation and ranking of eligible candidates for the vacancy. The vacancy is posted through a "Job Opportunity Announcement" (JOA). The JOA describes the position and its organizational location, the qualification requirements and the performance elements, and sets an initial closing date for receipt of applications. If the vacancy provides for a subsequent career promotion, i.e., promotion to a higher level without further competition, this is noted on the JOA. Applicants are requested to submit a resume of their qualifying experience along with a narrative description of their experience and training in the key performance areas of the job. The employee's current supervisor is also invited to comment on the employee's likelihood of successful performance.

After the closing date of the JOA, the personnel specialist determines the basic eligibility of each applicant. This is done by applying the OPM qualification standard (known in the trade as "handbook X-118") to each application. The X-118 standard describes for each occupation the kinds of experience which would be likely to provide the necessary knowledge and skill for entry and normal advancement. The standard specifies for each grade level of work within the occupation the number of years of general and specialized experience which must be shown for the applicant to be minimally qualified. Generally, the qualifying experience must have been progressively responsible, with at least one year of the specialized experience at a level of responsibility no more than two grades below the grade of the position to be filled. At the same time as the personnel specialist screens the qualifications of each applicant, he or she also checks the application materials to ensure that the applicant meets time-in-grade, time-after-competitive-appointment, and other regulatory prerequisites for promotion eligibility.

Once this screening process is completed, the personnel specialist assembles a panel of "subject matter experts." These persons, although not trained in personnel, are knowledgeable about the occupation for which applications have been taken. The panel is given the applications of eligible candidates and the crediting plan. Using the crediting plan as a guide, each panel member rates each application and the supervisors' remarks on the various performance elements which are identified in the plan. Then the panel discusses the ratings and reaches a consensus on a final numerical score for each candidate. The rated applications are then ranked and divided into three groups using a mathematical formula provided in the crediting plan. The highest group is the "best-qualified" pool. Candidates in this group are referred to the selecting official. Below this pool is a group of

"highly qualified" (but not best-qualified) candidates. These are not referred, but they are available should subsequent vacancies arise. The lowest ranked candidates are designated as "qualified." They will not be considered for selection until the pool of highly qualified candidates has been depleted.

The list of best-qualified candidates is forwarded to the selecting official. Final selection from this pool is essentially a discretionary matter with the selecting official, provided, of course, that his or her choice is based on some job-related reason, and provided that the evaluation method gives a fair opportunity to each candidate. (*E.g.*, ALMSA's promotion instruction provides that if the selecting official chooses to interview any candidate, he or she must attempt to interview all.)

B.

In February of 1981, two job vacancy announcements were posted for ALMSA employees. JOA 81-17 was for Management Analysts at grade 7 with career promotion potential to grade 9 ("GS-7 opt 9" in Army jargon). JOA 81-24 was for Management Analysts, GS-9 opt 11. All five plaintiffs applied for the GS-7 positions; plaintiffs Sorrells and Scherbring applied for the GS-9 position. Other persons applied as well. Plaintiffs Hollis, Kennedy, Sorrells, and McIntosh were determined by the personnel office to be eligible for the GS-7 position. Plaintiff Scherbring was determined to be ineligible. The four eligible plaintiffs were ultimately ranked by the rating panel among eleven best-qualified candidates for the five vacancies which were to be filled through JOA 81-17. Eventually, five persons, Judith Young, Rosemary Mest, Christy Wind, Maureen McNeill, and Carolyn Vierdag, were selected. All were white, and all but Ms. Mest were under 40 years old. None of the plaintiffs was selected.

On JOA 81-24 (the GS-9 position), plaintiff Sorrells was found to be highly qualified but not best qualified.

Plaintiff Scherbring was found ineligible. Judith Young was the only person listed as best qualified. She was referred for selection, but instead the selecting official chose Marie Carver, a GS-7 personnel intern at TSARCOM. This choice was justified as a "lateral transfer," but it was in fact a promotion. Although the promotion did not violate OPM merit promotion regulations (Ms. Carver had acquired promotion potential to the GS-11 level when, on a previous occasion, she competed for the position in the personnel intern program), the action did violate ALMSA's own merit promotion procedures. In order to correct this procedural error, her application was rated by the same ranking panel which had earlier set up JOA 81-24. The panel determined that Ms. Carver would have been one of two best-qualified candidates for the position. Her promotion was therefore allowed to stand. ALMSA then created an identical additional position and placed the other best-qualified candidate (Ms. Young) in it at the GS-9 level.

This and other irregularities in the procedures used by ALMSA in filling these vacancies led the plaintiffs to believe that the successful candidates had been "preselected"[2] for their promotions. They complained of discrimination to the Equal Employment Officer at ALMSA. Odessa Hollis alleged discrimination on account of her race (black); Elise McIntosh on account of being an American Indian; Susan Sorrells because of her Hispanic-

---

[2] "Preselection" is not defined in the statutes or in the Code of Federal Regulations. In common usage, as shown in the record and by its use in the FPM, it means favoritism toward one or more candidates who are competing for promotion. Preselection may involve giving a favored employee a competitive advantage through choice work assignments, or misuse of noncompetitive details to higher-graded work, or interference by a selecting official in the evaluation and rating process prior to actual selection. Although preselection is usually a violation of merit principles, it does not in itself amount to illegal discrimination against the employees who were not favored.

American heritage; and Ann Kennedy and JoAnn Scherbring on account of their age (over 40). Their informal complaints were not resolved favorably. On June 11, 1981, they filed formal complaints of discrimination with the United States Army Civilian Appellate Review Agency (USACARA). These complaints eventually resulted in investigations and reports by ALMSA, TSARCOM, USACARA, DARCOM, and OPM.

In April 1981, the plaintiffs wrote to their representatives in Congress, complaining of irregularities and favoritism in ALMSA's promotion practices. This prompted congressional inquiries into the matter, which in turn prompted an investigation by DARCOM, the agency to which both ALMSA and TSARCOM report. In early June 1981, DARCOM sent personnel expert Elizabeth Bailey from its Alexandria, Virginia, offices to St. Louis to review ALMSA's personnel actions. Ms. Bailey's investigation lasted two days. She concluded from it that several deficiencies were evident in ALMSA's promotion actions, including improper rating of candidates' qualifications in JOAs 81-17 and 81-24.

The chief personnel officer at TSARCOM, Civilian Personnel Officer (CPO) Diane Ottolini, assigned defendant Edward Turner, Assistant CPO for TSARCOM, to handle matters connected with Ms. Bailey's investigation. When Ms. Bailey completed her investigation in early June, she directed Turner to undertake further review of the JOA 81-17 and JOA 81-24 promotion actions. Her oral instructions were followed up by a written directive from the Commander of DARCOM dated June 22, 1981. P. Ex. 10(a). Bailey's notes on her investigation, P. Ex. 10(b), which Turner acknowledged to reflect her orders accurately, J. Tr. IV:157-58,[3] indicate that Turner's task

---

[3] As we further explain *infra*, p. 17, there were a number of different hearings in this case, each dealing with a different aspect of the case. We will use the following designations to refer

was to "reconstruct" the two promotion actions. While Turner maintained that this meant that he was only to re-evaluate the basic qualifications of the applicants under OPM's X-118 standards, the plaintiffs presented extensive evidence showing that Turner was to redo both the minimum-qualification determination *and* the succeeding step, the rating and ranking of the qualified candidates by a panel of subject-matter experts. Expert witness Chris Kunz, a former OPM employee, testified that the term "reconstruct" had a generally accepted meaning in the federal personnel field, and that it meant that both the minimum-qualification determination and the rating-and-ranking phase were to be redone. Further, DARCOM's written directive of June 22, 1981 states: "reconstruction is directed only for the *rating* and *ranking* of all candidates who applied under each announcement." P. Ex. 10(a) at 2 (emphasis added). Finally, Francis "Bud" Steins and Valeda Henson, two former personnel staffing specialists drafted by Turner to carry out the review of the promotion actions, testified that Turner specifically directed them to "reconstruct" the actions, and that they understood from this that both a minimum-qualification screening and a new rating-and-ranking phase were required.

On June 11 and 12, 1981, Steins and Ms. Henson took the applications and, without reviewing the original determinations, applied the X-118 standards for the two positions, producing new minimum-qualification evaluations. Then, on June 16, 1981, they convened a subject-matter-expert panel whose members were three ALMSA Management Analysts who had no connection with the original actions; also present as observers were an EEO representative and a labor-union representative. The panel completed its rating-and-ranking task on June 17, 1981. The results of this Stein-Henson reconstruction were, as

---

to various portions of the trial record: "J. Tr." for the jury trial transcript and "B. Tr." for the bench trial transcript.

we further explain below, significantly different from the original evaluation of the applicants.

On the day the panel finished its work, Steins and Ms. Henson turned all of the panel materials, including the report of their results, over to Turner. Turner reviewed the results of the Steins/Henson reconstruction, and then, dissatisfied with it, convened a "third panel" to review the promotion actions. Two of the three persons Turner selected for this panel were Edward Jones, the personnel staffing specialist who had done or participated in the original minimum-qualification determinations for both JOAs, and Barry Bainter, Jones's immediate superior. Turner's panel did not re-rate the applications, but merely reviewed the original minimum-qualification determinations, referring at points to the Steins/Henson evaluations. This third panel concluded that the original determinations were "defensible." J. Tr. I:50.

This result was communicated to Ms. Bailey at DARCOM in a report dated July 25, 1981. Turner did not mention the Steins/Henson reconstruction in this report or in any other communication with DARCOM. In early August, DARCOM informed Turner that its response to the congressional inquiry had been drafted, and that it accepted the position taken in Turner's report. At DARCOM's request, Turner met with the five complainants and a number of other persons on August 11, 1981, to inform them of this result.

After Turner's panel had completed its work, he placed the Steins/Henson reconstruction materials on his credenza. Then, within a few months after DARCOM's response to his report, under Turner's orders the Steins/Henson results were shredded. Meanwhile, beginning on August 10, 1981, union representative Ralph Edwards lodged a series of requests and demands for the results of the reconstruction. In a September 9, 1981 meeting,

Turner told union representatives that they would not receive the Steins/Henson results because they had not been used, and that he had not used them because the panel had exceeded its authority when it rated and ranked the applicants. J. Tr. II:156, P. Ex. 34 and 40. Turner did not indicate that the Steins/Henson reconstruction had been or would be destroyed. In October, in response to continuing union requests, Ray Fulkerson, a labor-relations specialist at TSARCOM, informed Edwards that he hoped to provide the union with the requested information. J. Tr. II:164, P. Ex. 42. In late November, Fulkerson gave Edwards a package of documents which Fulkerson presented as ALMSA's response to the request. However, the package did not contain materials from either the Steins/Henson panel or Turner's third panel. Instead, on December 9, 1981, Fulkerson informed Edwards that the materials from the Steins/Henson reconstruction no longer existed. In a February 9, 1982, letter to Edwards, Colonel Wayne C. Hogan, Commander of ALMSA, confirmed that the Steins/Henson results had been destroyed, noting that ALMSA efforts to locate the results had been unsuccessful.

At trial, several of the participants testified as to their recollection of the Steins/Henson reconstruction. Most significantly, they testified that with one exception, none of the persons actually selected for either position was rated even minimally qualified in the Steins/Henson reconstruction. The line exception was Judith Young, who in the reconstruction survived the minimum-qualification screening for the JOA 81-17, GS-7 opt 9 position, but not for the position she ultimately obtained, the JOA 81-24, GS-9 opt 11 position. As to the plaintiffs, various witnesses recalled that Sorrells, Kennedy, and McIntosh were rated Best Qualified in JOA 81-17, and that Sorrells was rated Best Qualified in JOA 81-24. However, no one recalled the Steins/Henson reconstruction results for plaintiffs Hollis and Scherbring.

Turner's position at trial was that he had discarded the Steins/Henson reconstruction because he thought that Steins and Henson had been too strict in applying the X-118 standards and because they had convened a rating-and-ranking panel, a step that, as noted above, he maintained they were not supposed to take. He further asserted that the documents were destroyed because they had not provided the basis for his final decision in the matter, and because they contained confidential Privacy Act information, see 5 U.S.C. § 552a, about the applicants. However, the plaintiffs' position, which a jury could and did accept, was that Turner rejected the Steins/Henson results because they demonstrated that ALMSA employees had engaged in wrongdoing; that for the purpose of covering this up and avoiding discredit to the agencies for which he worked and to his fellow employees, he convened a biased third panel to legitimate the original actions and then ordered the Steins/Henson results destroyed; and that he continued this cover-up and attempted to avoid discovery of his misdeeds by giving what were at best evasive responses to the requests of the plaintiffs and of union officials for production of the Steins-Henson results.

While DARCOM's August 1981 response to the congressional inquiry had accepted Turner's position, OPM and DARCOM continued to be concerned that something was amiss. In October and November 1981, OPM and DARCOM conducted a joint survey of ALMSA's entire personnel operation, including the JOAs challenged by the plaintiffs. In December 1981 and January 1982, OPM (P. Ex. 12) and DARCOM (P. Ex. 13), issued reports of their initial findings, stating that they found "strong indications of significant problems in the assignment of employees to positions." P. Ex. 12(a). OPM reported that it appeared that there had been cases involving "the use of non-competitive promotions as a means of preparing certain employees for future ad-

vancement," *id.*, and a number of instances in which OPM's X-118 qualification standards had been ignored or misapplied. P. Ex. 12(b). With specific relevance to this case, OPM called into question the qualifications of selectees McNeill (P. Ex. 12(b), at 36), Vierdag (*id.* at 38), Wind (*id.* at 40), and Young (*id.* at 43), and questioned the prior experience progression of selectee Mest (*id.* at 29). ALMSA and TSARCOM did not acquiesce in these accusations; their response to the OPM and DARCOM survey continued to adhere to Turner's position. See P. Ex. 49 and 77. Nothing in the record indicates that OPM or DARCOM took any further action on the matter.

The USACARA reports on the plaintiffs' formal agency complaints were completed on January 20, 1982. USACARA recommended that the complaints of Sorrells and McIntosh be sustained and that Hollis's complaint be denied. The record is unclear as to what was recommended on the ADEA complaints of Kennedy and Scherbring. Ultimately, ALMSA resolved part of Sorrells's complaint by retroactively reassigning her to a GS-7 Management Analyst Position and subsequently promoting her to GS-9. D. Ex. K and L. However, her complaint over non-selection for the GS-9 opt 11 position remained unresolved. Nor did ALMSA take any favorable action with respect to McIntosh.

After the USACARA report was completed, plaintiffs Hollis, McIntosh, Kennedy, and Scherbring requested an administrative hearing before the EEOC. See District Court Order of April 17, 1984. The hearing was scheduled for May 24, 1982. However, on April 5, 1982, this action was filed. Subsequently, EEOC temporarily stayed the administrative proceedings at the request of the plaintiffs, see P. Ex. 25, over the protest of the defendants, see Order of April 17, 1984.

The reprisal complaint (Count II) is based on the following facts: (1) At various times during the process-

ing of these complaints, top management of ALMSA referred to the complainants as the "famous five," a term which the plaintiffs regard as demeaning under these circumstances. See, *e.g.*, P. Ex. 16, ALMSA Board of Directors minutes dated March 4, 1982. (2) In 1981, after the initial discrimination complaints were filed, plaintiff Sorrells submitted an application to the TSARCOM personnel office for future vacancies in the Program Analyst occupation. The application was placed in the Applicant Supply File.[4] At some point later in that year, Sorrells's application was overlooked for three vacancies in the Program Analyst occupation. Eventually, the error was corrected by her receiving priority consideration[5] for three like vacancies. See B. Tr. VI:15-16. (3) In June of 1982, a vacancy for Management Analyst GS-9 opt 11 occurred. It was announced on JOA 82-19. Plaintiffs Hollis, Kennedy, Sorrells, and Scherbring applied. After the closing date of the announcement, but before the applications had been rated, the selecting official, Kenneth Dawley (who had also been the selecting official on JOA's 81-17 and 81-24 and who had been named in the administrative complaints as an alleged discriminating official) asked the personnel office to return to him the supervisory appraisals which he had completed or reviewed for certain of his employees who were applying for the job. This practice, although perhaps irregular, apparently did not directly violate any

---

[4] The Applicant Supply File is a pool of applications by outside candidates which is maintained by the personnel office for a limited period of time. When a vacancy occurs, these applications are supposed to be screened in order to determine whether any of the outside applicants is eligible. Any application that survives this screening is placed in competition with those of the internal candidates who have applied in specific response to the vacancy announcement.

[5] Priority consideration is a mechanism by which a candidate who has missed consideration is referred singly to the selecting official before other candidates are considered.

regulation. Mr. Dawley allegedly asked other supervisors to reconsider the appraisals which they had given certain of their employees. Ultimately, however, no changes were made and the applications and appraisal forms were returned to the personnel office. Mr. Dawley then requested that the vacancy be cancelled. This was done. In October 1982, another vacancy occurred in Mr. Dawley's office. JOA 82-19 was then reactivated and the applications were evaluated and ranked. Plaintiffs Sorrells and Hollis were among the best qualified, but were not selected for the position. Instead, Dawley selected Jane Null, a non-ALMSA employee who had applied after the cancellation of the initial vacancy.

C.

The initial complaint on April 5, 1982 alleged four counts: (I) individual Title VII claims of discrimination by Hollis, Sorrells, and McIntosh, and ADEA claims by Kennedy and Scherbring; (II) reprisal claims by all five plaintiffs; (III) a class count; and (IV) the records-destruction claim against Edward Turner. On March 21, 1984, the District Court denied the plaintiffs' motion to maintain a class action. D.R. at 114-21. On April 17, 1984, the Court dismissed the ADEA claims. D.R. at 122-26. The Court denied defendant Turner's motion for summary judgment on Count IV on May 24, 1984, and this claim was tried to a jury on August 13-17, 1984. The jury awarded each of the plaintiffs one dollar in nominal damages and $10,000 in compensatory damages. Plaintiffs Sorrells and Kennedy were also awarded $15,000 in punitive damages; the other three plaintiffs were awarded $10,000 each in punitive damages. On August 31, 1984, the Court entered judgment on the verdicts against Edward Turner in the total amount of $110,005 plus interest and costs. D.R. at 138-39. The Title VII individual claims (Counts I and II) were tried to the Court on seven days between November 1984 and

January 1985. The Court found for the defendants on both counts on July 12, 1985. D.R. at 140-49.

II.

In Count III of the complaint, the plaintiffs sought to maintain an action on behalf of a class of ALMSA employees who were American Indians, Hispanic-Americans, blacks, or over 40 years old. They alleged that ALMSA's promotion program was flawed by irregularities which systematically put members of these protected groups at a disadvantage. After two days of hearing on the class complaint, held during October 1983, the Court dismissed Count III on the ground that none of the plaintiffs had exhausted their administrative class remedies as required by 42 U.S.C. § 2000e-16(c) and 29 C.F.R. § 1613.601-.643.

The plaintiffs' position is, first, that their individual administrative complaints of discrimination were sufficient to give notice of a class claim since the matters complained of were inherently characteristic of a class claim. Second, they contend that even if their individual claims did not state the claim of the class, the federal courts may nonetheless entertain a class action despite the lack of an administrative record. We reject both arguments.

When a statute mandates that the complaint first seek relief through an established administrative mechanism before filing suit in the federal court, the administrative process must be fully exhausted before the court can act. *Edwards v. Department of the Army*, 708 F.2d 1344, 1346 (8th Cir. 1983) (per curiam). Congress has established in Section 717 of the Civil Rights Act of 1964 (42 U.S.C. § 2000e-16) the exclusive remedy for federal-employee complaints of employment discrimination. *Brown v. General Services Administration*, 425 U.S. 820, 832-35 (1976). The legislative scheme in § 717 includes both administrative and judicial components. Since a

civil action under this portion of the Act is a suit against the sovereign, litigants are strictly bound by whatever limitation Congress, in consenting to suit, has seen fit to place on the action. See *Jordan v. United States*, 522 F.2d 1128, 1131 (8th Cir. 1975). Among these limitations is an explicit requirement that the aggrieved employee first seek an administrative resolution of his or her complaint. 42 U.S.C. § 2000e-16(c). The Equal Employment Opportunity Commission has issued rules and regulations governing the administrative complaint process. 29 C.F.R. §§ 1613.201-.806. These regulations and the administrative mechanism which they create are not a mere alternative means of resolving disputes between employee and federal employer. They are prerequisites to a suit in federal court. See *Brown*, 425 U.S. at 832-35.

The plaintiffs contend that exhaustion of their individual remedies is sufficient to confer jurisdiction on the District Court, not only to hear those claims, but also to hear a class claim which was never presented through the administrative channels, so long as the class claim has at its core the facts on which the individual complaints are based. They are mistaken. The administrative procedures established by EEOC for the processing of discrimination complaints includes a detailed method for pursuing claims of class-wide discrimination. 29 C.F.R. §§ 1613.601-.643. The administrative complaint must include allegations of numerosity, commonality, typicality, and representativeness which parallel the requirements in Fed. R. Civ. P. 23(a). 29 C.F.R. § 1613.601(b). The administrative complaint must set out specifically the facts on which the class seeks relief. 29 C.F.R. § 1613.603(b). The class representatives must await either a final agency decision or a 180-day lapse without decision before commencing their suit in court. 29 C.F.R. § 1613.641. Nowhere in the regulation is there any suggestion that processing of an individual com-

plaint to exhaustion gives the complainant a right to carry an unadjudicated class count piggyback into federal court. See *Lewis v. Smith*, 731 F.2d 1535, 1540 (11th Cir. 1984).

The authority on which the plaintiffs rely is inapposite. They cite *Chandler v. Roudebush*, 425 U.S. 840 (1976), for the proposition that federal Title VII litigants are entitled to a fresh start in federal court regardless of the course of proceedings at the administrative stages. But *Chandler* holds only that federal Title VII litigants are entitled to trial de novo in district court just as are private litigants; the federal court is not to defer to the agency on the merits; the case says nothing about exhaustion. *Wade v. Secretary of the Army*, 796 F.2d 1369, 1376 (11th Cir. 1986). Other cases relied on by the plaintiffs predate the promulgation of the EEOC regulations on administrative class actions in 1977. At that time, there was no explicit class remedy at the administrative level. Instead, courts would allow class actions if the substance of the class complaint had been raised through an individual administrative complaint. See, *e.g.*, *Eastland v. Tennessee Valley Authority*, 553 F.2d 364 (5th Cir.), *cert. denied*, 434 U.S. 985 (1977). This result was sound under the law at the time since there was no express administrative class-action procedure to exhaust. See *Griffin v. Carlin*, 755 F.2d 1516, 1530-31 (11th Cir. 1985). But since the advent of the 1977 regulations, there is no reason to bypass the administrative process.

Appellants further assert that even if an administrative class-action complaint is a prerequisite to this suit, they have fulfilled that requirement through their consolidated administrative complaint, which stated in part: "the complainants were not afforded fair and equal consideration without regard to political, religion, or labor organization affiliation, marital status, race, color, sex, age, national origin, non-disqualifying physical or mental

handicaps or any other criteria [sic] that is not job related, including favoritism based on personal relationships or patronage." P. Ex. 83. They allege that this and other boilerplate stated "across-the-board allegations that fit the model for class actions," Appellants' Brief at 42, and thereby gave the Army adequate notice that it was contending with a class complaint. This argument is without merit. 29 C.F.R. § 1613.603(b) requires that the administrative class complaint be stated specifically and in detail; § 1613.601 requires that the Rule 23(a) criteria of numerosity, commonality, typicality, and representativeness be addressed. There is a good reason for this. If the agency is to attempt to resolve the grievance, and if a usable record is to be assembled, the nature of the complaint must be defined. An administrative proceeding which is based on guesswork by the defending party and by the adjudicating authority is likely to be a waste of time for all concerned. See *Wade*, 796 F.2d at 1377-78. Exhaustion of administrative remedies certainly means something more than going through the motions; it means thorough and specific presentation of the grievance and its development until a final decision is reached. *Edwards*, 70 F.2d at 1346. Here, the class claim was neither presented nor developed at the administrative level and therefore may not be asserted in court. We therefore affirm the District Court's dismissal of Count III.

III.

Plaintiffs Ann Kennedy and JoAnn Scherbring appeal the dismissal of their ADEA complaint in Count I. They had filed consolidated administrative complaints along with the other plaintiffs. On January 20, 1982, the USACARA report was completed and they requested a hearing. Before the EEOC hearing (scheduled for May 24, 1982) could be held, this action was filed. They requested, and received, a temporary stay of proceedings from the EEOC, over the protest of the Army. By Order

dated April 17, 1984, the District Court granted the defendants' motion to dismiss their complaint on exhaustion grounds.

Under the ADEA, aggrieved federal employees have two routes into federal court. They may avoid administrative processing of their complaints entirely or in part by filing a notice of intent to sue with the EEOC at least 30 days before filing the lawsuit (but within 180 days after the alleged acts of discrimination have occurred). 29 U.S.C. § 633a(d). This requirement of advance notice to the EEOC gives the EEOC some time to attempt informal conciliation between the employer and the employee. See *Ray v. Nimmo*, 704 F.2d 1480, 1483 (11th Cir. 1983) (citations omitted). Alternatively, the aggrieved employee may elect to pursue her administrative remedies. This is done by filing a formal complaint of discrimination with the employing agency. 29 U.S.C. § 633a(b); 29 C.F.R. §§ 1613.511, 1613.214. Final agency action may be appealed to the EEOC. The Act provides that after filing a complaint with the EEOC,[6] the employee may institute a civil action in District Court. 29 U.S.C. § 633a(c) and (d). There is no formal exhaustion requirement written into the Act or its implementing regulations, as there is under Title VII. See *supra*, Section II.

There is authority to support the government's position that exhaustion is required. See, *e.g.*, *Purtill v. Harris*, 658 F.2d 134 (3d Cir. 1981), *cert. denied*, 462 U.S. 1131 (1983). General principles of administrative law may require application of this doctrine despite the absence of any express reference to it in the statute. On the other hand, as plaintiffs point out, the statute

---

[6] The filing of a formal complaint with the employee's agency, as was done here, satisfies this requirement. See *Purtill v. Harris*, 658 F.2d 134, 138 (3d Cir. 1981), *cert. denied*, 462 U.S. 1131 (1983).

gives them the right to go into court directly. We need not pursue this issue, however, because events have outrun it. We are informed by the government, Brief for Appellee at 45 n.10 that EEOC, having apparently changed its initial decision to suspend administrative proceedings pending this action in court has now made a finding of no age discrimination against plaintiffs Kennedy and Scherbring. The Army took final agency action by accepting this finding on December 24, 1985. It seems then, that administrative remedies have now been fully exhausted and the question whether exhaustion is legally required no longer has any practical significance in this case. The District Court's order dismissing the age claims in Count I must therefore be vacated as moot. On remand, plaintiffs may proceed in court with these claims.

IV.

We turn now to the remaining individual claims under Title VII. These are Count I, alleging discrimination on account of race and national origin against plaintiffs Hollis, Sorrells, and McIntosh, and Count II, alleging reprisal. The District Court entered judgment for the defendants on July 12, 1985, following a bench trial lasting seven days. The Court also had before it all evidence which had been taken in the earlier hearings for class certification and the jury trial of the constitutional claim against defendant Turner.

For their appeal, the plaintiffs raise five alleged errors by the trial court: (1) The Court erred in ruling that the plaintiffs' adverse-impact theory was inapplicable; (2) the Court erred in not finding that the plaintiffs were necessarily better qualified than the persons actually promoted when the jury in the Turner trial had allegedly already determined that issue in the plaintiffs' favor; (3) the Court gave insufficient weight to the plaintiffs' statistical evidence; (4) the Court erred in

not finding that the defendants' proffered explanation for the non-selection of the plaintiffs was pretextual when the selections were accomplished through violations of civil service laws and regulations; and (5) the Court erred in not finding that the plaintiffs were victims of reprisal when the Court did not make specific findings of fact on the question. We shall take up each of the plaintiffs' points in turn.

A.

The plaintiffs presented their Title VII case on both an adverse-treatment theory and an adverse-impact theory. The District Court held that a challenge to the employer's subjective decision-making processes was inappropriate for adverse-impact analysis. The plaintiffs contend that the District Court misapprehended the basis for their adverse-impact complaint. They say that they had no quarrel with ALMSA's promotion system "in [its] pristine form," the broad outlines of which conformed to OPM and Army regulatory guidelines, but rather pointed to ALMSA's "facially neutral . . . violations of the legally mandated procedures." Appellant's Brief at 26-27. The plaintiffs complain of a systemic pattern of departures from the rules, including the use of uncontrolled details for the purpose of "trying out" prospective candidates for promotion, permissive misassignment of favored employees to jobs which would build their credentials for promotion, and final selection based on favoritism. There was ample evidence in the record that such practices did occur, and that ALMSA had been afflicted with such irregularities for a number of years. See, *e.g.*, P. Ex. 12, 12a, 13, 14a, 14b, 14c, and 14d. The plaintiffs' theory was that this pattern of prohibited practices had become so ingrained at ALMSA that it had become a *de facto* promotion system in itself, without regard to the written promotion plan. We do not think, however, that it makes a difference whether the plaintiffs were challenging merely the subjective ele-

ments of the promotion system as written in the regulations or the *de facto* policies and practices which ALMSA used to carry out that system. The substance of this part of the complaint is the same in either instance: a challenge to the cumulative effect of an entire set of personnel operations, on the ground that members of minority groups were disadvantaged thereby.

The adverse-impact model is designed to give relief to plaintiffs who are the unintended victims of personnel practices which bear unevenly on members of protected minority groups. Such practices, if not justifiable on the ground of business necessity, operate as "built-in headwinds" for members of minority groups. *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971). They are objectionable not because they disclose any purposeful discrimination, but because for no sufficient reason they tilt the field of competition against the minority employee.

Since intent is not an element of the adverse-impact case, this theory in effect gives the plaintiff a leg up on his proof. But the adverse-impact theory compensates for this advantage by imposing on the plaintiff a more exacting duty of showing the actual effect of the challenged practice. *Lowe v. City of Monrovia*, 775 F.2d 998, 1004 (9th Cir. 1985). In a typical adverse-treatment case, the plaintiff states a *prima facie* case simply by showing (1) he is a member of a protected class; (2) he applied for a position for which he was qualified; (3) he was not selected; and (4) the position remained open after the selection. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). In an adverse-impact case, on the other hand, the plaintiff must first show (1) an identifiable, facially neutral personnel policy or practice; (2) a disparate effect on members of a protected class; and (3) a causal connection between the two. *Carroll v. Sears, Roebuck & Co.*, 708 F.2d 183, 189 (5th Cir. 1983).

The classic impact case is one in which a graded examination is used for selection purposes. This was the situation in *Griggs*. Impact analysis is also useful in assessing the effect of other objective measures. See, *e.g.*, *Green v. Missouri Pacific Railroad*, 523 F.2d 1290 (8th Cir. 1975) (employer refused employment to any person convicted of a crime other than a traffic offense). But when the plaintiff seeks to attack a subjective or discretionary practice, or the cumulative effect of a series of such discretionary steps, use of the adverse-impact model raises difficult problems of analysis. There has been considerable disagreement and uncertainty among the courts which have addressed this issue. *Compare Pouncy v. Prudential Life Insurance Co.*, 668 F.2d 795, 800-01 (5th Cir. 1982) (impact model inappropriate vehicle for attack on cumulative effect of subjective decisionmaking), *with Rowe v. Cleveland Pneumatic Co.*, 690 F.2d 88, 93 & n.10 (6th Cir. 1982) (subjective evaluation procedure may be analyzed under both impact and treatment theories). In our own Circuit, we have been less than clear on the question. See, *e.g.*, *Talley v. United States Postal Service*, 720 F.2d 505, 507 (8th Cir. 1983), *cert. denied*, 466 U.S. 952 (1984), and *Harris v. Ford Motor Co.*, 651 F.2d 609, 611 (8th Cir. 1981), which hold that a system of subjective decision-making does not fit the adverse-impact model; *but see Gilbert v. City of Little Rock*, 799 F.2d 1210, 1214 (8th Cir. 1986); *Equal Employment Opportunity Commission v. Rath Packing Co.*, 787 F.2d 318, 327-28 (8th Cir.) *cert. denied*, 107 S. Ct. 307 (1986); and *Jones v. Hutto*, 763 F.2d 979, 983-84 (8th Cir.), *vacated on other grounds*, 106 S. Ct. 242 (1985), which suggest that at least in a class-action context, subjective decision-making can be attacked both under the adverse-treatment model and through adverse-impact analysis.

We are happy to say that the facts of the present case make it unnecessary to enter this labyrinth. Even if we

were to hold that the plaintiffs' theory fits the adverse-impact model, we should still be constrained to uphold the decision of the District Court, because plaintiffs presented no substantial proof of disparate impact.

Proof of disparate impact was attempted through the use of workforce statistics. The plaintiffs' data purported to show the number of persons, identified by race, in each grade level at ALMSA. The data also purported to show the average number of years of federal service for each racial group in each grade. See P. Ex. 6a, 6b, and 6c. From these data, the plaintiffs sought to demonstrate that there was a disproportionately small number of blacks, Hispanic Americans, and American Indians in the upper grade levels of ALMSA, and that white persons were being promoted in less time than were minority group members. These data were fatally flawed. As a matter of causation, they did not isolate variables other than discrimination which could have caused the disparity (assuming that there was one). In algebraic terms, an adverse impact is shown through the equation $(x)W/A=B/C$, where W/A expresses the ratio of white persons promoted ("W") to the number of white applicants qualified for promotion at each grade level ("A"), while B/C represents the ratio of minority persons promoted at each grade level per the number of qualified minority applicants. If, when the equation is solved, the variable "x" turns out to be less than one, the fact of a disparity will appear. Further quantitative tests on "x" can be used to determine whether the disparity is significant. Instead of offering the foregoing analysis of promotion behavior, the plaintiffs offered data which gave a "snapshot" of the racial composition of each grade-level at ALMSA. Such figures do not take into account the important variables of how many minority group members were actually applying for promotion, or how many were actually qualified for promotion. Without isolation of these variables through determina-

tion of the actual ratio of persons promoted to persons qualified, any value found for "x" is unreliable to show that there was a disparity, let alone that defendants' promotion policies caused it. *See Gilbert v. City of Little Rock*, 722 F.2d 1390, 1396 (8th Cir. 1983), *cert. denied*, 466 U.S. 972 (1984).

Thus, even if the District Court erred in ruling that the plaintiffs' disparate-impact theory is inapplicable in this sort of case, the error would not lead to reversal. If we were to reverse now and remand to the District Court, its next step would be to make a finding of fact on the question of adverse impact. If it were to find that adverse impact existed, there would inevitably be a second appeal, and we would be compelled to reverse this finding, because, as we have just explained, there is no substantial evidence in this record to support it. (We have no reason to suppose that the parties have not already put in all of their proof revelant to this issue.) Accordingly, it is appropriate for us now to take the steps of upholding, on other grounds, the District Court's rejection of the disparate-impact theory. By so doing, we simply avoid the rigmarole of a futile remand and second appeal, all ending in a result that is already clear on the record. The Supreme Court has approved such a use of appellate power. See *Pullman-Standard v. Swint*, 456 U.S. 273, 292 (1982).

B.

The bulk of the plaintiffs' case proceeded under a theory of disparate treatment. In such a case, the key question, on which the plaintiff always bears the burden of proof, is whether the defendant intentionally discriminated against the plaintiffs.

The District Court found as fact that the plaintiffs were all members of protected classes; that they all applied and were qualified for the Management Analyst positions; none of them was selected; and the persons

selected were all white. The plaintiffs therefore all established a *prima facie* case of discrimination. *McIntosh v. Weinberger*, No. 82-491 C (5), slip op. 5 (E.D. Mo. July 12, 1985). The District Court also ruled that the defendant had articulated a legitimate, non-discriminatory reason for the non-selection of the five plaintiffs, i.e., that the selecting officials believed that the persons actually promoted were better qualified for the positions. The Court ultimately held that the plaintiffs had not succeeded in proving that they had suffered intentional discrimination. Opinion of July 12, 1985, at 6. This is a finding of fact which is binding on us unless clearly erroneous. We are not convinced that appellants have met this burden.

We address in turn the major assaults made by plaintiffs on the District Court's findings. The plaintiffs first urge that the trial court erred in finding that the defendants had articulated a legitimate, nondiscriminatory reason for the plaintiffs' nonselection. The Court accepted the proffered reason, which was that the persons ultimately selected were better qualified than were the plaintiffs. The plaintiffs contend that in the earlier jury trial on Count IV (the records-destruction claim against Mr. Turner) the jury had necessarily found as a fact that the plaintiffs were among the best qualified for the positions and that the selected persons were not qualified at all. The plaintiffs argue that the jury finding precluded a contrary finding on the identical question by the Court in the Title VII bench trial.

Generally, when a case involves both a jury-trial portion and a bench trial, any essential factual issues which are central to both must be tried to the jury, so that the litigants' Seventh Amendment jury-trial rights are not foreclosed on the common factual issues. *Sisco v. J.S. Alberici Const. Co.*, 655 F.2d 146, 151 (8th Cir. 1981), *cert. denied*, 104 S. Ct. 1485 (1982). We have held that in an employment-discrimination case which is

based on both Title VII and 42 U.S.C. § 1981, prior jury determination in the § 1981 action of the core issue of discrimination precludes by collateral estoppel a contrary result in the Title VII bench trial. *Id.* See also *Goodwin v. Circuit Court*, 729 F.2d 541, 549 n.11 (8th Cir. 1984). In such a case, the success of the plaintiffs on either theory depends on one crucial fact: whether the defendant intentionally discriminated against the plaintiff. Jury determination of that central fact is binding on the trial judge.

No such identity of issues is present here. The jury trial on the constitutional tort claim ended in a general verdict for plaintiffs. We cannot be sure what specific facts the jury found. We assume for present purposes that the Turner jury thought the personnel reconstruction that was destroyed had reached the conclusion that plaintiffs were "best qualified," and that the persons actually selected were not qualified at all. This is not at all the same issue that was before the Court in the bench trial on the Title VII claims. There, the issue was whether the promoting officials (acting long before the reconstruction overseen by Turner) believed (whatever the actual fact) that the persons promoted were better qualified than the plaintiffs. The issues are close to each other, and a finding as to either of them would be heavily influenced by one's view as to relative qualifications in fact, but the issues are not identical. There can therefore be no estoppel. We recall the language of Lord Coke: "Every estoppel . . . must be certain to every intent, and not to be taken by argument or inference." Co. Lit. 352b.

Next, the plaintiffs assert that the Court clearly erred in not giving adequate weight to the plaintiffs' statistical evidence. The plaintiffs' objection really is that the District Court did not document with sufficient detail its findings on the statistical evidence. There is no merit in this contention. The Court is not required to render

specific findings with respect to every item of evidence presented to it. *Talley v. United States Postal Service*, 720 F.2d 505, 507 (8th Cir. 1983), *cert. denied*, 466 U.S. 952 (1984) (citation omitted). We find no error in the trial court's treatment of the plaintiffs' statistical data.

We also reject the plaintiffs' argument that the defendants' explanation of their conduct was necessarily pretextual because "the selections were accomplished through deviations from legally mandated civil service procedures and requirements . . ." Appellants' Reply Brief 11. To be sure, there was ample evidence from which the District Court could have found that ALMSA was regularly running afoul of OPM's regulations for conduct of its personnel operation. The Court in fact so found. Opinion of July 12, 1985, at 7-9. But the point of this case is not to determine whether ALMSA was running a tight ship; it is to determine whether ALMSA intentionally discriminated against the plaintiffs in their nonselection for the Management Analyst positions. To some degree, the bulk of evidence which the plaintiffs submitted to prove that ALMSA was disregarding personnel guidelines actually proves too much; ALMSA's pattern of disregard for the regulations was not directed against these plaintiffs or against the classes to which they belong; rather, it was general and pervasive. It affected all applicants, regardless of their race or national origin, by inserting excessive subjectivity, uncertainty of expectations, and (perhaps) favoritism into the promotion process. These are ills; but the general impact on all applicants does not require the factfinder to reach a conclusion that failure to follow guidelines amounted to intentional discrimination on the basis of a criterion prohibited by Title VII.

The plaintiffs argue, citing authority from a district court in another circuit, that "when the federal government is involved, deviation from legally mandated civil

service procedures and requirements cannot form the basis of a legitimate, lawful explanation sufficient to overcome a *prima facie* case of discrimination." *Hogan v. Pierce*, 31 F.E.P. Cases 115, 126 (D.D.C. 1983). While evidence of regulatory violations by a federal employer is probative of pretext, the statement quoted above paints too broadly. A personnel decision is not discriminatory simply because it is a bad personnel decision. The legal and regulatory guidelines administered by OPM serve worth-while purposes other than preventing discrimination. The bare fact of irregular personnel decisions does not foreclose the employer's opportunity to demonstrate a lack of discriminatory motive.

Finally, the plaintiffs assert error in the District Court's finding that they had not been victims of reprisal by ALMSA on account of their filing complaints of discrimination. There was contradictory evidence and testimony on all of the points relevant to this claim. Had the Court chosen to make all the inferences favorable to the plaintiffs and to discredit all the testimony favorable to defendants, which it could have done, a resulting judgment for the plaintiffs would not have been reversible. However, there was ample evidence and testimony from which the Court could also have found, as it did, for the defendants. Bearing in mind that the trial court is in the best position to judge for itself the weight of evidence and the credibility of witnesses, we see no clear error here.

The plaintiffs' objection to the lack of detailed findings on the selection made under JOA 82-19 is insubstantial. The Court had before it all the evidence from the class-action hearing, the jury trial, and the bench trial. It was unnecessary for the Court to comment on each and every datum of evidence.

For all the reasons which we have discussed, the judgments of the District Court for the defendants on the Title VII counts are affirmed.

V.

We next consider defendant Turner's appeal from the verdict against him in his individual capacity awarding the plaintiffs damages on their *Bivens* claims. Turner's principal arguments are that he is entitled to qualified immunity, that the plaintiffs' *Bivens* claims are precluded because other statutory remedies were available, and that the plaintiffs did not demonstrate that Turner's actions harmed them. He further argues that the verdict was excessive and the result of passion and prejudice, that there was insufficient evidence to support the jury's punitive-damages award, that the jury's verdict was inconsistent, and that the District Court erred in denying an instruction stating that Turner was personally and individually liable for any judgment.

A.

Turner maintains the plaintiffs' action for damages is barred under the qualified-immunity doctrine of *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), and related cases.[7]

---

[7] The plaintiffs suggest that Turner surrenders his qualified-immunity defense by failing to appeal immediately the District Court's denial of summer judgment on this ground. While Turner was clearly entitled to take such an appeal, see *Mitchell v. Forsyth*, 105 S. Ct. 2806, 2815-17 (1985); *Wright v. South Arkansas Regional Health Center*, 800 F.2d 199 (8th Cir. 1986), we cannot agree that he was compelled either to do so or forfeit his defense. *Mitchell* did, as the plaintiffs emphasize, recognize that the rejection of a qualified-immunity summary-judgment motion is an appealable final order under 28 U.S.C. § 1291 and the collateral-order doctrine of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949), reasoning that qualified immunity is due in part to concern over the cost to effective government of requiring public officials to stand trial, 105 S. Ct. at 2815, a concern that is moot where the trial is already completed. Yet, *Mitchell* clearly recognizes that qualified immunity is also concerned with protecting public officials from being subjected to monetary liability for their official actions, and this concern of course remains substantial even where trial has gone forward. See *Mitchell*, 105

In *Harlow*, the Supreme Court abandoned the "totality of the circumstances" test for qualified immunity that it had applied in *Wood v. Strickland*, 420 U.S. 308, 318-22 (1975); see also *Scheuer v. Rhodes*, 416 U.S. 232, 247-48 (1974), a test that required both an examination of the "objective" reasonableness of the public official's actions in light of governing law, and an inquiry into the official's "subjective" good faith. *Davis v. Scherer*, 468 U.S. 183, 191 (1984). In its stead, *Harlow* erected a wholly objective standard, under which

> government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

457 U.S. at 818.[8] See generally Comment, *Harlow v. Fitzgerald: The Lower Courts Implement the New*

S. Ct. at 2815, *citing Harlow v. Fitzgerald*, 457 U.S. at 816. Hence we conclude that, as is generally the case for appealable interlocutory orders, see *Scarrella v. Midwest Federal Savings & Loan*, 536 F.2d 1207, 1209 (8th Cir.), *cert. denied*, 429 U.S. 885 (1976); 9 Moore's Federal Practice, § 110.18 (1986), failure immediately to appeal the rejection of a qualified-immunity defense does not bar raising it on appeal after trial.

[8] While it rejected Turner's qualified-immunity defense on summary judgment, the District Court also submitted an instruction on the defense to the jury, requiring the jury to examine the objective reasonableness of Turner's conduct and his subjective good faith. J. Tr. V:74-75. Turner contends, and we agree, that subsection of this instruction was error. *Mitchell* makes clear, 105 S. Ct. at 2816 & n.9, that with *Harlow*'s rejection of inquiry into the public official's subjective good faith, the issue of qualified immunity has become predominantly legal in character. The court, rather than the trier of fact, is to determine "whether the facts alleged . . . support a claim of violation of clearly established law." *Id.* The fact-finder's role is limited to determining whether the underlying facts are as the plaintiff has alleged or proved. See Note, *Qualified Immunity for Government Officials: The Problem*

Standard for Qualified Immunity Under Section 1983, 132 U. Pa. L. Rev. 901, 905-22 (1984).

1.

The District Court expressly declined to reach the question whether Turner violated clearly established law; instead, citing *Harlow*'s "discretionary function" language, the District Court rejected the qualified-immunity defense on the ground that Turner had acted in a ministerial rather than a discretionary capacity when he ordered the Steins/Henson documents destroyed. Order of May 24, 1984, at 5. The plaintiffs maintain that Turner violated a ministerial duty because he was acting pursuant to a clear DARCOM directive to reconstruct the ALMSA promotions, and, most importantly, because the Federal Personnel Manual, Army regulations, and ALMSA regulations imposed an absolute, nondiscretionary duty to maintain all documents relating to placement actions for at least two years. See Federal Personnel Manual Ch. 335-29, 6-1.b.(3); Army Regulation C5, AR 690-300, Ch. 335.1, 1-4 Req. 5.a.; ALMSAR 690-12, Ch. 8-1.

The distinction between ministerial and discretionary duties of public officials has a long history. See, *e.g.*, *Amy v. The Supervisors*, 11 Wall, 136, 138 (1870); *Kendall v. Stokes*, 3 How. 87, 98 (1845). However, the

---

of Unconstitutional Purpose in Civil Rights Litigation, 95 Yale L. J. 126, 141-43 (1985).

However, while the District Court erred in submitting the legal question of immunity to the jury, this presents us with no occasion to disturb the judgment. First, it appears that the contested instruction had its origin with Turner's counsel, and that he did not object to its submission. Further, the jury's rejection of the defense has not adversely affected Turner, since in any event our review of this legal question is *de novo*, and we conclude, as we explain below, that Turner was not entitled to qualified immunity.

plaintiffs have cited, and we can find, no recent case other than that before us in which a court has rejected qualified immunity simply because the official in question was performing a ministerial duty. Modern Supreme Court cases have continued to speak of this ministerial/discretionary dichotomy, see, *e.g.*, *Harlow*, 457 U.S. at 816, 818; *Davis*, 468 U.S. at 196 n.14, but in our view the Supreme Court's discussion of the ministerial-duty exception in *Davis* establishes that the exception is too narrow to comprehend this case. *Davis* states that breach of a ministerial duty defeats qualified immunity only where that breach itself gives rise to the plaintiff's cause of action. 468 U.S. at 197 n.14; see *id.* at 194-95 & n.12.[9] Here, there is no claim that the federal personnel regulations Turner violated or the laws authorizing their promulgation create a cause of action. Instead, the plaintiffs have sued upon a separate law, the Fifth Amendment to the Constitution, claiming that Turner deprived them of due process. We therefore conclude that Turner is not barred from asserting qualified immunity on ministerial-duty grounds. What matters is not whether he violated a clear agency regulation, but whether a reasonable official in his position would have known that he was violating the Fifth Amendment.

2.

The question thus becomes whether Turner violated the plaintiffs' clearly established rights. Turner forfeited

---

[9] The *Davis* Court did not derive this limitation on the ministerial-duty exception from the common-law, ministerial-discretionary function concept of official immunity, but instead imported the stricture from its analysis of the objective test of immunity, which focuses not upon whether the official was exercising discretion, but upon whether he violated clearly established law. As we explain below, *infra* p. 36-37 earlier in its opinion, the *Davis* Court had ruled that the clearly established law which has been violated must be the basis of the plaintiff's cause of action, so that officials can anticipate when their actions may result in monetary liability. 468 U.S. at 194-95 & n.12.

his immunity only if it was clearly established at the time of these events in 1981 that the property interests the plaintiffs claim in fact existed and that Turner's actions deprived them of these property interests without due process of law.

As we have said, it is not sufficient for this purpose to demonstrate simply that it was clearly established that Turner's actions contravened the federal personnel document-retention regulations. Again, *Davis* holds that "[n]either federal nor state officials lose their immunity by violating the clear command of a statute or regulation . . . unless that statute or regulation provides the basis for the cause of action sued upon." 468 U.S. at 194 n.12; *Freeman v. Blair*, 793 F.2d 166, 173 (8th Cir. 1986). This is so because "officials can act without fear of harassing litigation only if they reasonably can anticipate when their conduct may give rise to liability for damages . . . ." *Davis*, 468 U.S. at 195, citing *Butz v. Economou*, 438 U.S. 478, 506-07 (1978), and *Harlow*, 457 U.S. at 814. As noted above, the plaintiffs have sued not upon a cause of action that violation of the regulations themselves gives rise to, but upon the Due Process Clause of the Fifth Amendment.[10] Turner is entitled to qualified immunity unless the law establishing that he violated the plaintiffs' due-process rights was clearly established.

The plaintiffs claim that Turner deprived them of due process in connection with two separate property inter-

---

[10] The plaintiffs have not argued that *Davis*'s requirements are met by violation of the document-retention regulations on the theory that the regulations are a source of the property interest that gives rise to their claim. We are not, in any event, inclined to believe that it is adequate under *Davis* simply to demonstrate the violation of such a regulation where the constitutionally-protected interest was not itself clearly established, since *Davis* emphasizes, 468 U.S. at 195, that the official must be able to anticipate that his actions may give rise to monetary liability. *But see Hicks v. Feeney*, 770 F.2d 375, 380 n.4 (3d Cir. 1985).

ests. First, the plaintiffs contend that they had a property interest in ALMSA's merit-promotion system, that this system, taken as a whole, amounted to a contract under which plaintiffs were assured that their applications for promotion would be fairly judged or reviewed on their merits. They maintain that by concealing the Steins/Henson results from DARCOM, substituting for them the results of a third panel with two members who were interested in the original placement action, and destroying the Steins/Henson documents, Turner denied them due process with respect to this interest, because he subverted DARCOM's investigation, an investigation that was aimed at assuring that the merit-promotion system's requirements had been followed. Second, the plaintiffs contend that they had a property interest in their EEO claims, and that Turner's destruction of the Steins/Henson materials denied them due process in this regard by depriving them of favorable evidence whose equivalent they could not obtain elsewhere. On appeal, Turner has addressed only the latter theory, arguing that it was not clearly established that a property interest existed in EEO claims. We address both theories.

" '[P]roperty' interests subject to procedural due process protection are not limited by a few rigid, technical forms;" instead, " 'property' denotes a broad range of interests that are secured by 'existing rules or understandings.' " *Perry v. Sinderman*, 408 U.S. 593, 601 (1972), quoting *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). The key consideration is that these rules or understandings must provide the person claiming a property interest in a benefit with "a legitimate claim of entitlement to it," rather than merely "a unilateral expectation of it." *Roth*, 408 U.S. at 577. At least since *Perry* was decided in 1972, it has been clearly established that agency rules and policies can provide such a legitimate claim of entitlement to benefits associated with government employment.

Of course, absent statutes, regulations, or some other basis for such a legitimate claim of entitlement, government employment and promotion decisions are normally not subject to procedural due-process protections. See, *e.g.*, *Colm v. Vance*, 567 F.2d 1125, 1130 (D.C. Cir. 1977) (Foreign Service officer had no property interest in promotion). Here, however, extensive OPM, Army, and ALMSA regulations governing promotion, all of which were in effect when Turner acted, provided the plaintiffs with a substantial, legitimate expectation by establishing that applications for competitive placement, such as those of the plaintiffs and the other applicants for the JOA 81-17 and 81-24 Management Analyst positions, were to be evaluated in accord with specified criteria and procedures. See Federal Personnel Manual, Ch. 335; Army Regulation C5, AR 690-300, Ch. 335; ALMSAR 690-12 (esp. Ch. 4-5); FPM X-118 Handbook, Management Analyst Series Qualification Standards. We therefore hold that the plaintiffs had a property interest in ALMSA's merit-promotion system that was clearly established.

We also conclude that the plaintiffs had a property interest in their EEO claims that was clearly established in 1981, Turner, as we noted above, has argued that this interest was not clearly established; his position is that not until *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982), was decided, some months after his actions, was there any recognition that a property interest exists in such claims. An examination of *Logan* itself disposes of this argument. In *Logan*, considering whether the plaintiff's Illinois Fair Employment Practices Act handicap-discrimination claim involved a property interest, the Supreme Court, without dissent, stated that the question "was affirmatively settled by [*Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950)], where the Court held that a cause of action is a species of property protected by the Fourteenth Amendment's Due Process

Clause." 455 U.S. at 428. The *Logan* Court added that there was "no meaningful distinction" between the *Mullane* cause of action and the *Logan* FEPA claim, emphasizing that its conclusion was "hardly a novel one." *Id.* at 429. Hence, to require that Turner have conducted himself consistently with the recognition of a property interest in the plaintiffs' EEO claims is not to require that he have "predict[ed] the future course of constitutional law," *Pierson v. Ray*, 386 U.S. 547, 557 (1967), but merely that he apply clearly established law in a new, but indistinguishable, context.

Turner has not argued that even if, as we hold, the property interests claimed by the plaintiffs were clearly established, it was not clearly established that his conduct deprived them of process which they were due, and we see no room for such a contention. For the issue here is not, as it is in many qualified-immunity cases, see, *e.g.*, *Davis*, 468 U.S. at 191-92; *Culbreath v. Block*, 799 F.2d 1248 (8th Cir. 1986), the often difficult question of whether pre-deprivation, rather than post-deprivation, process was clearly established to be due. Rather, with respect to the merit-promotion-system interest, the plaintiffs' claim, accepted by the jury, was that Turner, through his disposition of the Steins/Henson results and his substitution for them of the third panel's results in his report to DARCOM, prevented DARCOM from obtaining evidence that would have demonstrated the shortcomings of the original actions, thereby completely undermining the procedural protections that the DARCOM investigation was meant to provide. We do not think it could be seriously argued that the fundamental unfairness of such a subversion of the whole process would not have been clear to a reasonable person in Turner's position. We also think it clear that the destruction of evidence supporting the plaintiffs' EEO claims and not obtainable elsewhere was fundamentally inconsistent with due process, *cf. Brady v. Maryland*, 373 U.S. 83

(1963); *California v. Trombetta*, 467 U.S. 479 (1984), and that this tool would have been clear to a reasonable person.

We thus conclude that Turner was not entitled to qualified immunity.

B.

Turner next argues that the District Court erred in holding that the plaintiffs could maintain a *Bivens* constitutional tort action, citing *Bush v. Lucas*, 462 U.S. 367 (1983). We disagree.

The general rule governing recognition of *Bivens* actions is set out in *Carlson v. Green*, 446 U.S. 14 (1980), which states that "victims of a constitutional violation by a federal agency have a right to recover damages against the official in federal court despite the absence of any statute conferring such a right," except in two situations: where " 'special factors counsel[] hesitation in the absence of affirmative action by Congress,' " *id.* at 18, quoting *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 396 (1971), and citing *Davis v. Passman*, 442 U.S. 228, 245 (1979), and where "Congress has provided an alternative remedy which it explicitly declared to be a *substitute* for recovery directly under the Constitution and viewed as equally effective." *Carlson*, 446 U.S. at 18-19, citing *Bivens*, 403 U.S. at 397, and *Davis*, 442 U.S. at 245-47 (emphasis in original). In *Bush*, the Court applied this standard to a federal employee's claim that he had been demoted in retaliation for the exercise of his First Amendment rights. Civil Service Commission regulations provided the employee with remedies that the Court assumed were less effective than a *Bivens* action (since, *e.g.*, they were argued not to permit punitive-damage awards), 462 U.S. at 372 & n.8, but viewed as clearly constitutionally adequate. *Id.* at 378 n.14. Congress had not expressly declared that these remedies were

to provide the exclusive mode of redress for such claims, or that suit directly under the Constitution was precluded. *Id.* at 373. The *Bush* Court concluded that a *Bivens* action was nonetheless barred by virtue of "special factors counselling hesitation," emphasizing the considerable history of Congressional attention to the relationship between federal employees and their superiors available to the employee. *Id.* at 388-90.

Thus, "*Bush* held only that where civil servants enjoy meaningful *and constitutionally adequate* . . . statutory remedies for [constitutional] violations, federal courts should not imply an additional *Bivens*-type *damages remedy* under the Constitution." *Doe v. United States Department of Justice*, 753 F.2d 1092, 1109 n.17 (D.C. Cir. 1985); see *Kotarski v. Cooper*, 799 F.2d 1342, 1346-50 (9th Cir. 1986). The fatal deficiency in Turner's argument is that he has not identified any other remedy for his actions that the plaintiffs could have invoked. The administrative remedy that was available to contest the demotion in *Bush*, an appeal to the Merit Systems Protection Board (MSPB) under 5 U.S.C. §§ 7512 and 7513, is not available here because Turner's actions are not covered by this procedure, which applies only to removals, suspensions for more than fourteen days, reductions in grade, and furloughs of thirty days or less. See *Bush*, 462 U.S. at 385 & n.28.

Turner suggests that his actions may have been remediable through a discrimination or retaliation claim under Title VII and the ADEA. However, the plaintiffs have made no claim and adduced no evidence showing that Turner acted for discriminatory reasons or in retaliation for the filing of EEO claims, rather than out of a bureaucratic desire to squelch charges that ALMSA employees had not done their duty. Turner also suggests that he may have engaged in a prohibited personnel practice actionable by the Special Counsel of MSPB under

5 U.S.C. § 1206. However, even if we assume this to be true, we note that the statute authorizing the Special Counsel to investigate and seek corrective action for such practices places the decision whether or not to do so in his discretion, 5 U.S.C. §§ 1206(b)(3)(A), (h), that the injured employee is not a party to and has no right to appeal any action taken, 5 U.S.C. § 1207(c), and, most importantly, that in an action filed by the Special Counsel the MSPB is authorized to take disciplinary action against Turner, but not to award any affirmative relief to the injured employee. 5 U.S.C. § 1207(b). This is not adequate to bar a *Bivens* action. *Kotarski*, 799 F.2d at 1348-49; *Borrell v. United States International Communication Agency*, 682 F.2d 981, 990 (D.C. Cir. 1982). We conclude with the District Court that the "plaintiffs are without redress as to defendant Turner's actions in the absence of a constitutional remedy," Order of May 24, 1984, at 3, and therefore that their *Bivens* action is not barred by *Bush*.

C.

Turner asserts that the plaintiffs failed to prove that they were injured by his actions, that the award of actual damages was excessive, that there was no basis for an award of punitive damages, and that the jury verdict was inconsistent. Turner further contends that he was entitled to a jury instruction stating that he, rather than the government, would be liable for any damage award. We address each of these points in turn.

We think a reasonable jury could have found that had Turner ever reported the Steins/Henson results to DAR COM, corrective action would have been taken and the plaintiffs would have received the promotions they sought, or, perhaps, some other favorable action. There was evidence that the Steins/Henson reconstruction found the applicants who received jobs in the original actions not minimally qualified for the positions they received, and

that Sorrells, Kennedy, and McIntosh should have been rated Best Qualified. Further, while they did not know how Hollis and Scherbring fared under the Steins/Henson reconstruction (though they knew that Hollis had been ranked Best Qualified in the original action), this was entirely due to Turner's destruction of the documents, and this was sufficient to support a jury inference that Hollis and Scherbring were also rated Best Qualified. The jury could have found that Sorrells was the highest-rated applicant for the JOA 81-24, GS-9 position, and that the remaining four plaintiffs were among six or seven applicants ranked Best Qualified for the five JOA 81-17, GS-7 positions. From this the jury could reasonably have concluded that but for Turner's actions, the plaintiffs would have received some relief as a result of DARCOM's investigation, resolving any doubts about what DARCOM would have done against Turner because, absent his wrongdoing, there would be no such doubts.

Thus, the plaintiffs did adequately demonstrate injury in connection with their DARCOM-investigation claim, and we therefore reject Turner's appeal on this point.

We further hold that there was ample evidence to support the jury's award of $10,000 in actual damages to each plaintiff. The plaintiffs presented evidence of lost earnings, adverse effects upon career potential, and emotional distress caused by Turner's acts; the jury could reasonably have found that some or all of these elements amounted to the damages awarded.

We also conclude that the punitive-damage award is supported by the evidence. The plaintiffs argued, and the jury could have found, that Turner, in breach of his official trust and responsibilities, intentionally concealed and later destroyed the Steins/Henson results in order to cover up wrongdoing at ALMSA. This sort of conduct justifies assessing punitive damages. See *Smith v. Wade*, 461 U.S. 30, 56 (1983); *Goodwin v. Circuit Court*, 729 F.2d 541, 547 (8th Cir. 1984).

We do agree with Turner that the jury's verdict exhibits an inconsistency. While the jury awarded each plaintiff $10,000 in actual damages, it also placed a check mark on the portion of the verdict form providing that the plaintiff had suffered a constitutional violation but no actual injury, and should receive one dollar in nominal damages. However, as the plaintiffs point out, Turner did not object to this when the clerk announced the verdict, when the jury was polled, or at any other time before discharge, and did not request that the jury be returned to the jury room to reconsider its verdict; he thereby waived any objection to this inconsistency. *Ludwig v. Marion Laboratories, Inc.*, 465 F.2d 114, 118 (8th Cir. 1972). Further, Turner's objection would fail even if it had not been waived. "It is the duty of the courts to harmonize the answers to interrogatories if it is possible under a fair reading of them." *Id.*, citing *Gallick v. Baltimore & Ohio R. Co.*, 372 U.S. 108, 119 (1963); see also *McIntyre v. Everest & Jennings, Inc.*, 575 F.2d 155, 157 (8th Cir.), *cert. denied*, 439 U.S. 864 (1978). Here, we think it apparent that when the jury checked the nominal-damages portion of the verdict, it mistakenly thought either that it was merely indicating that there had been a violation of the plaintiffs' rights or that it was permissible to award both actual and nominal damages; in either case, it is clear that the jury found the plaintiffs had suffered actual damages, and it would be improper to disturb that portion of its award.

Finally, we believe that the District Court properly refused Turner an instruction telling the jury that be would have to pay any damage award personally and that the government would not be liable for the award. At no point in the proceedings was it suggested to the jury that the government would be responsible; all that Turner has pointed to is that his attorney, though not in uniform, was sometimes addressed as "Captain Woodley." We think this inadequate to require that the jury

be given an instruction upon an issue that has no bearing on fault, an instruction that might induce the jury to decide upon improper grounds, such as undue sympathy for the defendant. See *Williams v. Bennett*, 689 F.2d 1370, 1391 (11th Cir. 1982), *cert. denied*, 464 U.S. 932 (1983), citing Fed. R. Evid. 403, and Advisory Committee Note to Fed. R. Evid. 411. The District Court did not abuse its discretion in remaining silent on the issue. *Williams*, 689 F.2d at 1391.

VI.

To summarize: with respect to the question of exhaustion of administrative remedies for plaintiffs' individual claims of age discrimination, the appeal is dismissed as moot, and the cause remanded to the District Court with directions to vacate as moot its order dismissing these claims, and thereafter to proceed as law and justice may require. In all other respects, the judgment of the District Court is

Affirmed.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 82-0491 C (5)

ELISE D. MCINTOSH, *et al.*,
Plaintiffs,

vs.

CASPAR W. WEINBERGER, *et al.*,
Defendants.

[Filed May 24, 1984]

MEMORANDUM AND ORDER

This matter is before the Court on defendant Turner's motion to dismiss or for summary judgment. Defendant Turner advocates three grounds on which this Court should dismiss all claims against him or grant summary judgment in his favor. The grounds asserted are that: 1) this action does not warrant the Court's authorization of a non-statutory remedy for plaintiffs' alleged Fifth Amendment violations; 2) the plaintiffs, as a matter of law, have not been deprived of a property interest in violation of the Due Process Clause; and 3) defendant Turner is immune from suit, despite his actions, under the doctrine of qualified immunity. For the reasons stated below, defendant Turner's motion is denied.

In Court IV of plaintiffs' complaint (plaintiffs' complaint alleges Title VII and ADEA violations by the U.S. Army), plaintiffs allege that defendant Turner deprived them of their property interest in violation of the

Due Process Clause of the Fifth Amendment. All parties agree that defendant Turner did, in fact, order the destruction of certain documents produced by the investigation of a "reconstructed panel". Plaintiffs aver that these documents contain the results of the reconstructed panel and that defendant Turner destroyed evidence in connection with the processing of their discrimination complaints. They further aver that they are without an adequate remedy for this wrong under the available Title VII and ADEA procedures and that defendant Turner's knowing and willful act deprives him of any immunity.

Under Rule 56 of the Federal Rules of Civil Procedure, a movant is entitled to summary judgment if he can "show that there is no genuine issue as to any material fact and that (he) is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). *See all Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464 (1962). In passing on a motion for summary judgment, a court is required to view the facts and inferences that may be derived therefrom in the light most favorable to the nonmoving party. *Buller v. Buechler*, 706 F.2d 844, 846 (8th Cir. 1983); *Vette Co. v. Aetna Casualty and Surety Co.*, 612 F.2d 1076, 1977 (8th Cir. 1980). The burden is on the moving party and a court should not grant a summary judgment motion unless it is convinced that there is no evidence to sustain a recovery under any circumstances. *Buller*, 706 F.2d at 846.

Plaintiffs have pled a federal tort cause of action against defendant Turner alleging deprivation of a property interest in violation of the Fifth Amendment. A direct federal civil suit for a constitutional violation, seeking monetary damages against the responsible federal official, was first recognized in *Bivens v. Six Unknown Federal Narcotic Agents*, 403 U.S. 388 (1971). Since *Bivens*, the Supreme Court has fine-tuned the scope of the "constitutional tort". *Carlson v. Green*, 446 U.S. 14 (1980); *Davis v. Passman*, 442 U.S. 228 (1979). A

Bivens-type action can be defeated by two fact situations: 1) where "special factors counseling hesitation in the absence of affirmative action by congress" exists; and 2) some type of alternative form of judicial relief exists, especially an exclusive alternative remedy. *Carlson*, supra; *Davis*, supra.

Defendant Turner relies heavily on the recent Supreme Court case of *Bush v. Lucas*, —— U.S. ——, 76 L.Ed.2d 648 (1983), in which upon consideration of the *Carlson* and *Davis* principles, the Court refused to create a *Bivens*-type cause of action for a federal employee seeking damages under the First Amendment for retaliatory demotion. After careful and extensive analysis, the Court held that there was no need to create a new federal tort cause of action because the Civil Service Commission's regulations adequately provided the plaintiff with a remedy. "Constitutional challenges to agency action, such as the First Amendment claims raised by petitioner, are fully cognizable within this system." *Bush v. Lucas*, 76 L.Ed.2d at 662.

Such a situation does not exist in the present case. Count IV of the plaintiffs' complaint seeks to remedy a wrong committed outside the context of their employment discrimination claims. Plaintiffs are alleging tortious interference with the ongoing investigatory processing of their EEO complaints. Plaintiffs' injuries relate to their discrimination claims but do not directly stem from actions taken in regard to their employment status. Instead, plaintiffs' cause of action is the type Justice Marshall and Blackman considered in their concurring opinion when they stated:

> "Moreover, there is nothing in today's decision to foreclose a federal employee from pursuing a *Bivens* remedy where his injury is not attributable to personnel actions which may be remedied under the federal statutory scheme."

Bush v. Lucas, 76 L.Ed.2d at 666.

The Court finds here that plaintiffs are without redress as to defendant Turner's actions in the absence of a constitutional remedy. Title VII and the ADEA simply are not designed to adequately provide relief to the plaintiffs under the circumstances of this case. The remedial system provided under Title VII and the ADEA does not redress the intentional deprivation of a property interest as alleged by the plaintiffs. Plaintiffs have, therefore, adequately stated a claim upon which relief may be granted.

The second ground for dismissal sought by defendant Turner is that, as a matter of law, there has been no violation of the Fifth Amendment because no property interest exists under the circumstances outlined by the plaintiffs. Defendant Turner avers that plaintiffs were not entitled to the destroyed documents, therefore no deprivation of a property interest took place. Defendants counter by attempting to characterize their property interest as entitlement to having their complaints properly investigated, having access to the results of the EEOC investigation, and in having the agency render a decision based on all the results of the investigation.

The Supreme Court recently provided a thorough analysis of "property interests" protected by the Due Process Clause. *Logan v. Zimmerman Bush Co.*, 455 U.S. 422, 428-431 (1981). The Court in *Logan* specifically found that "property" is that which an individual is legally entitled to possess and furthermore "the types of interests protected as 'property' are varied and, as often as not, intangible, relating 'to the whole domain of social and economic fact.'" *Logan*, at 430, citing numerous decisions finding "property interests" in a legal cause of action, a license, utility service, disability benefits, education, government employment, driver's license, and welfare benefits. By virtue of this analysis of past decisions, the *Logan* court held that the petitioner had a protected

property interest in his right to use the FEPA's adjudicatory procedures. *Logan*, at 431.

Following the Supreme Court's more recent decisions analyzing the nature of a property interest, this Court cannot state, that as a matter of law, plaintiffs were not deprived of a property interest by defendant Turner's actions.

Finally, defendant Turner claims that although he admits to destroying (or at least ordering the destruction of) the documents in question, he is immune from suit under the doctrine of qualified immunity. He avers that even if the *Logan* decision were to characterize plaintiffs' allegations as a deprivation of a property interest, the *Logan* decision was rendered *after* his actions took place. He claims he cannot be held accountable for violating plaintiffs' property rights because it was not clearly established, at the time of the destruction, that a property right existed.

In a suit for damages arising from unconstitutional action, a federal official is entitled to the qualified immunity in *Scheuer v. Rhodes*, 416 U.S. 232 (1974). This entitlement is limited to the performance of discretionary functions and, as defendant Turner has pointed out, government officials are usually protected from civil liability insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 U.S. 308, 322 (1975) [sic].

On summary judgment, this Court may determine, not only the current applicable law, but whether the law was clearly established at the time an action occurred. *Harlow*, at 818. Assuming arguendo, that the law was not clearly established at the time the results of the reconstruction panel were destroyed, defendant Turner's defense of qualified immunity should be sustained. But as the *Harlow* court also emphasized "[i]mmunity gen-

erally is available only to officials performing *discretionary* functions" (emphahis added). *Id*, at 816. The parties cannot agree as to how to characterize the directive defendant Turner received from DARCOM. The Court has read the affidavits, depositions and exhibits submitted and finds that an issue of material fact still exists; whether the creation of the reconstruction panel was mandatory or discretionary under the circumstances in which the directive was given. The Court believes that the interpretation and application of the DARCOM directive is a question of fact requiring resolution by a jury.

Therefore,

IT IS HEREBY ORDERED that defendant Turner's motion to dismiss or for summary judgment be and is DENIED.

Dated this 24th day of May, 1984.

/s/ Stephen N. Limbaugh
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 82-491 C (5)

ELISE D. MCINTOSH, SUSAN C. SORRELLS, ODESSA HOLLIS, ANN E. KENNEDY and JOANN SCHERBRING,

Plaintiffs,

vs.

CASPAR W. WEINBERGER, Secretary of Defense; JOHN O. MARSH, JR., Secretary of Army; EDWARD TURNER, Individually and in his capacity as Assistant Civilian Personnel Officer for Troop support and Aviation Material Readiness Command,

Defendants.

[Filed Aug. 31, 1984]

JUDGMENT ON COUNT FOUR

This action came for trial before the Court and a jury, Honorable Stephen N. Limbaugh, District Judge, presiding and the issues having been duly tried and the jury having rendered its verdicts on count four of the complaint as to the violation of plaintiffs' constitutional rights to due process of law;

IT IS ORDERED AND ADJUDGED that plaintiff, Elise D. McIntosh, recover on count four of the complaint against defendant, Edward Turner, the sum of One and no/100 Dollars ($1.00) nominal damages, the sum of

Ten Thousand and no/100 Dollars ($10,000.00) actual damages, the sum of Ten Thousand and no/100 Dollars ($10,000.00) punitive damages, with interest at the rate of 11.93% per annum and costs.

IT IS ORDERED AND ADJUDGED that plaintiff, Susan Sorrells, recover on count four of the complaint against defendant, Edward Turner, the sum of One and no/100 Dollars ($1.00) nominal damages, the sum of Ten Thousand and no/100 Dollars ($10,000.00) actual damages, the sum of Fifteen Thousand and no/100 Dollars ($15,000.00) punitive damages, with interest at the rate of 11.93% per annum and costs.

IT IS ORDERED AND ADJUDGED that plaintiff, Odessa Hollis, recover on count four of the complaint against defendant, Edward Turner, the sum of One and no/100 Dollars ($1.00) nominal damages, the sum of Ten Thousand and no/100 Dollars ($10,000.00) actual damages, the sum of Ten Thousand and no/100 Dollars ($10,000.00) punitive damages, with interest at the rate of 11.93% per annum and costs.

IT IS ORDERED AND ADJUDGED that plaintiff, Ann E. Kennedy, recover on count four of the complaint against defendant, Edward Turner, the sum of One and no/100 Dollars ($1.00) nominal damages, the sum of Ten Thousand and no/100 Dollars ($10,000.00) actual damages, the sum of Fifteen Thousand and no/100 Dollars ($15,000.00) punitive damages, with interest at the rate of 11.93% per annum and costs.

IT IS ORDERED AND ADJUDGED that plaintiff, JoAnn Scherbring, recover on count four of the complaint against defendant, Edward Turner, the sum of One and no/100 Dollars ($1.00) nominal damages, the sum of Ten Thousand and no/100 Dollars ($10,000.00) actual damages, the sum of Ten Thousand and no/100 Dollars

($10,000.00) punitive damages with interest at the rate of 11.93% per annum and costs.

Dated at St. Louis, Missouri this 31st day of August, 1984.

/s/ Stephen N. Limbaugh
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 82-0491 C (5)

ELISE D. MCINTOSH, *et al.*,
Plaintiffs,

vs.

CASPAR W. WEINBERGER, *et al.*,
Defendants.

[Filed June 13, 1985]

MEMORANDUM AND ORDER

This matter is before the Court on defendant Turner's supplemental motion for a new trial or alternatively for relief from judgment. Both motions are based on the grounds of newly discovered evidence. Plaintiffs have filed a memorandum in opposition.

Defendant's motion, under Rule 59, Federal Rules of Civil Procedure, was served on plaintiffs on or about March 29, 1985. Judgment against defendant Turner on Count IV of the plaintiffs' complaint was entered on August 31, 1984. Rule 59(b) clearly states that motions for a new trial must be served no later than ten (10) days after judgment is entered. This Court has no authority to enlarge this time limitation. Rule 6(b), Federal Rules of Civil Procedure. Thus, defendant's motion for a new trial, pursuant to Rule 59(b), is untimely and will be denied.

Alternatively, defendant seeks relief from the judgment under Rule 60(b) on the same grounds of newly discovered evidence. Essentially, defendant contends that the true significance of plaintiffs' Exhibit 72 (page 2) was not discovered until an agency hearing, held February 12, 1985, on plaintiff Scherbring's ADEA claim. Specifically, defendant avers that plaintiffs' Exhibit 72 is, in reality, one of the actual documents that plaintiffs accused defendant of destroying, thereby interferring with their right to a full and complete evidentiary rehearing on their promotional qualifications. Defendants claims that the document was misfiled and in preparation of the agency hearing, the Army's counsel discovered that the document actually was a rating sheet (on plaintiff Scherbring) commissioned by defendant Turner.

Rule 60(b)(2) authorizes a court, in its discretion, to relieve a party from a final judgment on the basis of "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)." The time limit for relief under Rule 60(b) is one year from the date judgment was entered.

The Eighth Circuit has fine-tuned Rule 60(b)(2) by setting forth the criteria that the moving party must establish in order for the Court to grant a Rule 60(b)(2) motion. The movant must demonstrate that: 1) the evidence was discovered after trial; 2) it exercised due diligence to obtain the evidence for trial; 3) the evidence is not merely cumulative or impeaching; 4) the evidence is material; and 5) the evidence is such that a new trial probably would produce a new verdict. *Rosebud Sioux Tribe v. A & P Steel, Inc.*, 733 F.2d 509, 515 (8th C 1984).

The language of Rule 60(b)(2) and the *Rosebud* decision strongly indicate that the first hurdles to be overcome by the movant is qualifying the evidence as "newly discovered" and then showing that despite "due diligence"

the evidence could not be discovered in time for presentation at trial. The Court finds that defendant Turner has not met his burden on these two factors, thus the Court need not address the other factors listed by the *Rosebud court.*

Defendant admits that the evidence at issue is plaintiffs' Exhibit 72, specificially page 2. This document (now identified as the rating sheet on plaintiff Scherbring as commissioned by defendant Turner) was listed by plaintiffs on their pre-trial compliance and was offered into evidence at trial without any objections by defendant. Plaintiffs' Exhibit 72 consists of a record file of plaintiff Scherbring kept by the Army. Thus, it was originally in the Army's possession and in fact, still remains in the Army's possession. The Army's counsel, Ms. Lissek, admits that she failed to comprehend the significance of Page 2 of this Exhibit at an earlier time. The Court finds that Exhibit 72 contained information which was clearly available to defendant Turner throughout the discovery period and trial. The Court finds, therefore, that defendant Turner has failed to meet the burden of Rule 60(b)(2). Accordingly,

IT IS HEREBY ORDERED that defendant's supplemental motion for a new trial or for relief from judgment be and is DENIED.

Dated this 13th day of June, 1985.

/s/ Stephen M. Limbaugh
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 82-491 C (5)

ELISE D. MCINTOSH, *et al.*,
Plaintiffs,

vs.

CASPAR W. WEINBERGER, *et al.*,
Defendants.

[Filed July 12, 1985]

MEMORANDUM OPINION

This matter is before the Court on Counts I and II of the Complaint originally filed by plaintiffs McIntosh, Sorrells, Hollis, Scherbring and Kennedy. Prior to trial before the bench, plaintiffs Scherbring and Kennedy's Count I and II claims were dismissed without prejudice. Count III, which was a class-action claim, was previously ruled in favor of defendants; and Count IV involved a record destruction claim resulting in a jury trial in favor of the original five plaintiffs. Ultimately, the issues tried before the Court were those presented by Count I, the Title VII claims for race and national origin discrimination; and Count II as it involves retaliation for filing EEOC complaints. At the time, the parties agreed that all evidence adduced in the class-action claim, the jury trial and the bench trial would be considered by the Court in the evaluation of the merits of Counts I and II.

The Court has jurisdiction over the parties and subject matter jurisdiction pursuant to 28 U.S.C. § 1343 and 42 U.S.C. § 2000-5. Judgment will be entered for the defendants on both Counts I and II.

Plaintiff Elise D. McIntosh is a female American Indian citizen of the United States and a resident of St. Louis County, Missouri. Plaintiff Susan Sorrells is a female Mexican American citizen of the United States and a resident of Madison County, Illinois. Plaintiff Odessa Hollis is a black female citizen of the United States and a resident of St. Louis County, Missouri. Defendant Caspar W. Weinberger is the Secretary of Defense and defendant John O. Marsh is the Secretary of the Army.

At all relevant times, each of the plaintiffs (McIntosh, Sorrells and Hollis) was employed by the United States Army Material Development and Readiness Command (DARCOM), Automated Logistics Management Systems Activity (ALMSA), St. Louis, Missouri. They each occupied positions as Administrative Officers, GS-344-07, i.e. at a grade 7 level. The plaintiffs allege that they have been denied promotions due to their race or national origin, and have been subjected to acts of retaliation for filing EEOC complaints. Specifically, it is averred that defendant have discriminated against McIntosh and Hollis on the basis of national origin and race in the promotion selections made under JOA 81-17; against Sorrells on the basis of national origin in the promotion selection made under JOA 81-24; and against Hollis and Sorrells on the basis of race and national origin in the promotion selection made under JOA 82-19. Furthermore, plaintiffs contend that after they filed complaints with the EEOC, the defendants retaliated by failing to pull plaintiff Sorrells' application for a program analyst position from the "applicant supply file" in consideration of three job vacancies; and the plaintiffs were subjected to derogatory comments by the defendants.

Plaintiffs applied for promotions as Management Analysts pursuant to three separate Job Opportunity Announcements (JOA). JOA 81-17 and amendment was issued on February 23, 1981. Twenty persons, including the plaintiffs, applied. Each of the plaintiffs was rated as a "best qualified" candidate. Five white females, other than the plaintiffs, were ultimately chosen for promotion under JOA 81-17. JOA 81-24 was issued on February 27, 1981. Ten persons, including plaintiff Sorrells, applied for the management analyst position. Sorrells was one of three women referred as a "highly qualified" candidate. A white female was ultimately adjudged as best qualified and awarded the position. A fourth woman, Marie Carver, was accepted as a lateral transfer applicant and awarded the position also. However, it was discovered that Ms. Carver's transfer application was accepted improperly and so her application was subjected to competitive rating. Ms. Carver was subsequently found to also be best qualified and was therefore allowed to retain her promotion. The third announcement, JOA 82-19, was issued in June, 1982. Seven persons, including plaintiffs Hollis and Sorrells, applied for the opening. The plaintiffs Hollis and Sorrells were among those referred as "best qualified" candidates. A white female was chosen for the position.

In the fall of 1981, plaintiff Sorrells submitted an application for a program analyst position at ALMSA to the TSARCOM CPO. Her application was placed in the "applicant supply file" to be pulled for consideration when a vacancy occurred. The evidence indicates that her application was not pulled on three occasions. However, the evidence also shows that an attempt to remedy the oversights was made. Plaintiff Sorrells was given "priority consideration" for the next three program analysts' vacancies. Although given priority consideration, she was not selected to fill any of these positions.

The Court also finds that at least on one occasion, the plaintiffs were referred to collectively as the "Famous Five" by one or more supervisory personnel.

After plaintiffs' non-selection under JOA 81-17 and 81-24, the plaintiffs filed EEOC complaints alleging denial of promotion due to race and national origin discrimination. Plaintiff Sorrells filed an additional EEOC complaint alleging discrimination on the basis of reprisal in connection with JOA 82-19.

On the plaintiffs' Title VII claims, they assert both disparate impact and disparate treatment as the basis for recovery. After careful consideration of all the evidence, the Court finds that the disparate impact theory does not apply to the facts of this case. However, the Court does find that the plaintiffs have established a prima facie case of disparate treatment.

In order to establish a prima facie case of disparate impact, under the *Griggs* decision, a plaintiff must show "that a facially-neutral employment policy or practice actually operates in a discriminatory manner by excluding from a job a disproportionate number of minorities. *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971); *Talley v. U.S. Postal Service*, 720 F.2d 505, 507 (8th C 1983); *Hawkins v. Anheuser-Busch, Inc.*, 697 F.2d 810, 815 (8th C 1983); *Harris v. Ford Motor Co.*, 651 F.2d 609, 611 (9th C 1981); *Walton v. St. Louis Community College*, 583 F.Supp. 458, 471 (E.D. Mo. 1984). "A subjective decisionmaking system cannot alone form the foundation for a discriminatory impact case". *Talley*, at 507 citing *Harris*, at 611. Plaintiffs do not argue that such a facially-neutral system exists. Instead, they attack the subjective decision-making process utilized at ALMSA. They allege that the subjective promotion procedure (i.e. two-step evaluation of each candidate by immediate supervisor and then by a review committee, based on personal interviews, applicant's personnel file and application

and rating sheets) impacts disproportionately on minorities. A subjective decision-making system, such as the instant merit promotion plan, is not the type of program falling under the prohibition set forth in *Griggs*. *See, Harris*, at 611.

Having determined the foregoing, the first issue to be addressed by this Court is whether the plaintiffs have made a proper case under Title VII. The first task is for plaintiffs to establish, by a preponderance of evidence, a prima facie case of discrimination. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). In the context of promotions, a prima facie case of disparate treatment requires proof of the following elements: 1) plaintiff is a member of a protected class; 2) plaintiff applied for and was qualified for the promotion in question; 3) plaintiff was not promoted; and 4) a non-minority person with similar qualifications was promoted. *Burrows v. Chemed Corp.*, 743 F.2d 612, 615 (8th C 1984), *aff'd* 567 F.Supp. 978, 984 (E.D. Mo. 1983); *Bell v. Bolger*, 708 F.2d 1312, 1316 (8th C 1983); *Walton*, at 471. Once plaintiff establishes a prima facie case of discrimination, the burden shifts to defendant to rebut the allegation(s) "by articulating some legitimate non-discriminatory reason for the employee's rejection." *Burdine*, at 252-56; *McDonnell Douglas Corp.*, at 802; *Burrows*, at 615. If the employer meets this burden, the plaintiff then must prove, by a preponderance of the evidence, that the employer's stated reasons were merely a pretext. *Burdine*, at 252-56. Once the defendant has met the plaintiff's proof of articulating a reason for denial of the promotion, the presumption of discrimination drops from the case, and the court must then determine whether or not discrimination took place. *U.S. Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711 (1983); *Walton*, at 470. The ultimate factual inquiry by the district court is "whether the defendant intentionally

discriminated against the plaintiff." *Aikens, supra*; *Walton*, at 470. The burden of persuasion, with respect to the primary factual issue of intentional discrimination, always remains with the plaintiff. *Aikens, supra*; *Burdine*, at 256-258.

Plaintiffs are all members of a protected class: American Indian, Hispanic and black. They applied for promotions to positions in which they were qualified and were not selected for promotion into any of these positions. The persons chosen to fill the positions were all white females. Plaintiffs have established a prima facie case of race and national origin discrimination.

In order to rebut the presumption of discrimination created by the plaintiffs' prima facie case, the defendants have to "produce evidence the plaintiff was rejected or someone else was preferred for a legitimate, nondiscriminatory reason." *Aikens*, at 714. The defendants produced evidence that, although the plaintiffs were qualified for the positions vacant pursuant to the subject JOAs, the persons chosen were more qualified. Basically, defendants showed that the persons selected were viewed as having more detailed management experience, more education specifically geared toward the vacancy in question, and in some cases the specific skills required for the position. For example, Mr. Dawley chose Judith Young for a position on his manpower team because of her extensive background in manpower matters; Mr. Schmidt chose Carolyn Vierdag for a management analyst position because she had been his assistant since 1980, and was familiar with the Workload Control System; Mr. Rogier chose Maureen McNeill for a position in the Information Resource Management Division because she had extensive college training in computers; and Jane Null was chosen due to extensive experience related to management analyst skills.

Since the defendants have articulated legitimate, nondiscriminatory reasons for the plaintiffs' non-selection,

the plaintiffs must prove that such reasons were pretextual. There are two methods by which plaintiffs can meet this burden. They can persuade this Court that the employment decisions more likely than not were motivated by discrimination or by showing that the defendants' proffered reasons are unworthy of credence. *Aikens, supra*; *Bell v. Bolger*, at 1318. After reviewing all of the evidence, the Court finds that the plaintiffs have failed to meet their burden of proving that the defendants intentionally discriminated against plaintiffs on the basis of race and national origin.

ALMSA's merit promotion is operated through a subjective evaluation process. Such subjective promotion procedures are to be closely scrutinized because of their susceptibility to discriminatory abuse. *Bell v. Bolger*, at 1319-1320; *Paxton v. Union National Bank*; 688 F.2d 552, 563 n.15 (8th C 1982).

Essentially, ALMSA's promotion procedures are as follows: 1) a candidate applies and is given an evaluation by immediate supervisor; 2) these evaluations, plus candidates' applications and personnel files are screened by a personnel staffing specialist; 3) the personnel staffing specialist rates the candidates and chooses those considered to be "minimally qualified; 4) these persons are then referred to an ad hoc panel of "subject matter specialists" for rating as "best qualified" or "highly qualified" based upon the application package and an applicant rating summary; and 5) the selecting supervisor makes the final determination. Throughout the process several people will evaluate the candidate on the basis of the applicants' official personnel file and application, supervisory appraisals, point-rating system on experience, training and education and possibly personal interviews.

Plaintiffs' evidence makes much out of the use of subjective factors in promotional decisions. The Court does

not question that subjective factors played a major role in determining the ultimate selections. However, subjectivity in decision-making is not automatically conclusive of discrimination. "The use of subjective factors per se is not an evil that is sought to be eliminated by way of Title VII and related legislation; rather it is the use of racial factors in the employment decision-making context that is sought to be eliminated." *Ellison v. Best Foods, A Div. of C.P.C. International*, 598 F.Supp. 159, 166 (E.D. Ark. 1984).

The plaintiffs have failed to show that the subjective nature of the promotion process was utilized in order to practice race and national origin discrimination. The credible evidence does not indicate that plaintiff McIntosh was discriminated against because she is an American Indian, or plaintiff Sorrells because she is Hispanic, or plaintiff Hollis because she is black. No one knew McIntosh claimed American Indian heritage until she filed her first complaint to USACARA in 1982. Her personnel file does not reflect this fact and she could not testify to any direct communication of this fact to any supervisory personnel. Although Sorrells' Hispanic heritage and Hollis' race were common knowledge, no evidence was produced that such factors played any role in the employment decisions. The proffered statistics are inconclusive. They do not reflect any data on Hispanic employees because of small numbers; and contrary to plaintiffs' assertions, support defendants' contention that blacks were employed through out the grade levels, with a respectable percentage concentrated at Grade 9 or higher. Finally, evidence of procedural irregularities, albeit remedied by defendants, did not prove any intentional discrimination.

The plaintiffs further assert that improper procedures, i.e. acceptance of Marie Carver's application as a lateral transfer and Ken Dawley's "second look" at his evaluations of certain applicants under JOA 82-19, prove that

the defendants' explanations are to be discredited. The Court cannot agree. Although certain standard practices were not strictly followed, the Army did remedy the irregularities. An investigation into the selections made under JOA 81-17 and 81-24 was conducted, and "reconstruction panels" reviewed the selections. The original selections were upheld. As to Mr. Dawley's actions, plaintiffs may view it as irregular but cannot point to any Army regulation which prohibited him from reviewing his evaluations. As it was, no changes to his original evaluations were made.

As a whole, the Court finds that plaintiffs have failed to prove that the reasons given by defendants for the selections under JOA 81-17, 81-24 and 82-19 were not the true reasons for the final choices.

The plaintiffs also charge that defendants have retaliated against them for filing their EEOC complaints. Plaintiffs cite two instances by defendants which they allege were retaliatory in nature: a reference to plaintiffs collectively as the "Famous Five" and failure to pull plaintiff Sorrells' application for a program analyst position from the "applicant supply file".

Only one witness testified to actual usage of the term "Famous Five". Paul Harris, Director of Command Support from 1978-1983, stated that he used that term, on one occasion to refer to the five original plaintiffs collectively. He testified that he meant nothing derogatory by it and simply used it as a short cut way of referring to the plaintiffs. No other witness testified to using the term or hearing the term used. Plaintiffs did not testify to actual usage of the term, but did produce a follow-on report (i.e. minutes) of an ALMSA Board of Directors meeting on March 4, 1982 (Plaintiffs' Exhibit 16). The report notes that Captain Edward Turner made reference to a "meeting on the 'famous 5' is scheduled for 9 Mar 82." There is no indication that Captain Turner

actually used the term "Famous 5" or whether the unknown person writing up the minutes used the term as a collective abbreviation for the five original plaintiffs. The Court finds that this evidence is totally insufficient to support plaintiffs' contention that they have "endured the hatred and resentment of management officials" as reflected by the "bad-mouthing" of supervisory personnel (plaintiffs' supplemental memorandum of law, filed February 1, 1985).

The Court has already accepted as a proven fact that plaintiff Sorrells application was not pulled from the "applicant supply file." However, the uncontradicted testimony of Marie Carver indicates that there were several other people, including Ms. Vierdag, who also suffered from this administrative oversight. Ms. Carver also testified that she, personally, had nothing to do with two of the three "missed considerations". Furthermore, the Army apparently appeased plaintiff Sorrell by agreeing to give her "priority consideration" for three positions to compensate for her missing consideration for three prior vacancies. Priority consideration simply means that an applicant is referred to a selecting official on a one-name referral list; it is not a guarantee of selection. The Court finds that such an administrative error, which did not affect plaintiff Sorrell alone, to be insufficient to support an allegation of retaliation.

Although the jury found for plaintiffs on Count IV, the Court does not feel compelled to concur with the jury findings in reaching the Court's decision on Counts I and II. *See Lartius v. Iowa Dept. of Transportation,* 705 F.2d 1018 (8th C 1983). Count IV was a deprivation of property without due process claim against defendant Captain Edward Turner. Some underlying facts are the same in the three counts, but generally the factual and legal issues differed between the record destruction claim and the Title VII and retaliation claims.

As plaintiffs were able to submit a prima facie case, they will not be required to pay defendants' attorney fees, and the parties will be responsible for their respective court costs.

Accordingly, judgment will be entered for defendants on Counts I and II.

Dated this 12th day of July, 1985.

/s/ Stephen M. Limbaugh
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 82-491 C (5)

ELISE D. MCINTOSH, *et al.*,
Plaintiffs,

vs.

CASPAR W. WEINBERGER, *et al.*,
Defendants.

[Filed July 12, 1985]

ORDER

In accordance with the memorandum opinion filed herein this date,

IT IS HEREBY ORDERED that plaintiffs McIntosh, Sorrells and Hollis, as to Counts I and II, take nothing and that judgment be entered in favor of defendants with costs to be assessed against the parties respectively.

Dated this 12th day of July, 1985.

/s/ Stephen M. Limbaugh
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 82-491 C (5)

ELISE D. MCINTOSH, *et al.*,
Plaintiffs,

vs.

CASPAR W. WEINBERGER, *et al.*,
Defendants.

[Filed Aug. 5, 1985]

ORDER

IT IS HEREBY ORDERED that defendant Turner's motion for judgment notwithstanding the verdict or in the alternative for a new trial be and is DENIED.

Dated this 5th day of August, 1985.

/s/ Stephen M. Limbaugh
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 82-491 C (5)

ELISE D. MCINTOSH, *et al.*,
Plaintiffs,

vs.

CASPAR W. WEINBERGER, *et al.*,
Defendants.

[Filed Sept. 25, 1985]

ORDER

IT IS HEREBY ORDERED that defendant Turner's motion for relief from judgment be and is DENIED.

Dated this 25th day of September, 1985.

/s/ Stephen M. Limbaugh
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 85-2023/2086EM

ELISE D. MCINTOSH, *et al.*,
Appellants/Cross-Appellees,

v.

CASPAR W. WEINBERGER, *et al.*,
Appellees/Cross-Appellants.

Appeals from the United States District Court
for the Eastern District of Missouri

JUDGMENT

These appeals from the United States District Court were submitted on the record of the said district court, briefs of the parties and were argued by counsel.

Upon consideration of the premises, it is hereby adjudged and decreed that the judgment of the district court is affirmed in part, dismissed in part and remanded for further proceedings consistent with the opinion of this Court.

January 14, 1987

A True Copy

ATTEST:

/s/ Robert D. St. Vraim
Clerk, U.S. Court of Appeals
Eighth Circuit
May 15, 1987—
Mandate Issued (Partial)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 85-2086EM

ELISE D. MCINTOSH, *et al.*,
Appellees,

vs.

EDWARD TURNER, ETC.,
Appellant.

Appeal from the United States District Court
for the Eastern District of Missouri

Appellant's petition for rehearing en banc has been considered by the Court and is denied.

Petition for rehearing by the panel is also denied.

April 9, 1987

Order entered at the Direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the United States Constitution provides in pertinent part:

> "No person shall * * * be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Title 5, United States Code, provides in pertinent part as follows:

> § 1206. Authority and responsibilities of the Special Counsel
>
> (a) (1) The Special Counsel shall receive any allegation of a prohibited personnel practice and shall investigate the allegation to the extent necessary to determine whether there are reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken.
>
> * * * *
>
> (3) (A) In the case of information received by the Special Counsel under paragraph (1) of this section, if, after such review as the Special Counsel determines practicable (but not later than 15 days after the receipt of the information), the Special Counsel determines that there is a substantial likelihood that the information discloses a violation of any law, rule, or regulation, or mismanagement, gross waste of funds, abuse of authority, or substantial and specific danger to the public health or safety, the Special Counsel may, to the extent provided in subparagraph (B) of this paragraph, require the head of the agency to—
>
> (i) conduct an investigation of the information and any related matters transmitted by the Special Counsel to the head of the agency; and

(ii) submit a written report setting forth the findings of the head of the agency within 60 days after the date on which the information is transmitted to the head of the agency or within any longer period of time agreed to in writing by the Special Counsel.

• • • •

(4) Any report, required under paragraph (3)(A) of this subsection shall be reviewed and signed by the head of the agency and shall include—

(A) a summary of the information with respect to which the investigation was initiated;

(B) a description of the conduct of the investigation;

(C) a summary of any evidence obtained from the investigation;

(D) a listing of any violation or apparent violation of any law, rule, or regulation; and

(E) a description of any corrective action taken or planned as a result of the investigation, such as—

(i) changes in agency rules, regulations, or practices;

(ii) the restoration of any aggrieved employee;

(iii) disciplinary action against any employee; and

(iv) referral to the Attorney General of any evidence of a criminal violation.

(5)(A) Any such report shall be submitted to the Congress, to the President, and to the Special Counsel for transmittal to the complainant. Whenever the Special Counsel does not receive the report

of the agency head within the time prescribed in paragraph (3)(A)(ii) of this subsection, the Special Counsel may transmit a copy of the information which was transmitted to the agency head to the President and to the Congress together with a statement noting the failure of the head of the agency to file the required report.

* * * *

(c)(1)(A) If, in connection with any investigation under this section, the Special Counsel determines that there are reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken which requires corrective action, the Special Counsel shall report the determination together with any findings or recommendations to the Board, the agency involved, and to the Office, and may report the determination, findings, and recommendations to the President. The Special Counsel may include in the report recommendations as to what corrective action should be taken.

(B) If, after a reasonable period, the agency has not taken the corrective action recommended, the Special Counsel may request the Board to consider the matter. The Board may order such corrective action as the Board considers appropriate, after opportunity for comment by the agency concerned and the Office of Personnel Management.

* * * *

(e)(1) In addition to the authority otherwise provided in this section, the Special Counsel shall, except as provided in paragraph (2) of this subsection, conduct an investigation of any allegation concerning—

(A) political activity prohibited under subchapter III of chapter 73 of this title, relating to political activities by Federal employees;

(B) political activity prohibited under chapter 15 of this title, relating to political activities by certain State and local officers and employees;

(C) arbitrary or capricious withholding of information prohibited under section 552 of this title, except that the Special Counsel shall make no investigation under this subsection of any withholding of foreign intelligence or counterintelligence information the disclosure of which is specifically prohibited by law or by Executive order;

(D) activities prohibited by any civil service law, rule, or regulation, including any activity relating to political intrusion in personnel decisionmaking; and

(E) involvement by any employee in any prohibited discrimination found by any court or appropriate administrative authority to have occurred in the course of any personnel action.

(2) The Special Counsel shall make no investigation of any allegation of any prohibited activity referred to in paragraph (1)(D) or (1)(E) of this subsection if the Special Counsel determines that the allegation may be resolved more appropriately under an administrative appeals procedure.

(f) During any investigation initiated under this section, no disciplinary action shall be taken against any employee for any alleged prohibited activity under investigation or for any related activity without the approval of the Special Counsel.

(g)(1) Except as provided in paragraph (2) of this subsection, if the Special Counsel determines that disciplinary action should be taken against any employee—

(A) after any investigation under this section, or

(B) on the basis of any knowing and willful refusal or failure by an employee to comply with an order of the Merit Systems Protection Board,

the Special Counsel shall prepare a written complaint against the employee containing his determination, together with a statement of supporting facts, and present the complaint and statement to the employee and the Merit Systems Protection Board in accordance with section 1207 of this title.

(2) In the case of an employee in a confidential, policy-making, policy-determining, or policy-advocating position appointed by the President, by and with the advice and consent of the Senate (other than an individual in the Foreign Service of the United States), the complaint and statement referred to in paragraph (1) of this subsection, together with any response by the employee, shall be presented to the President for appropriate action in lieu of being presented under section 1207 of this title.

(h) If the Special Counsel believes there is a pattern of prohibited personnel practices and such practices involve matters which are not otherwise appealable to the Board under section 7701 of this title, the Special Counsel may seek corrective action by filing a written complaint with the Board against the agency or employee involved and the Board shall order such corrective action as the Board determines necessary.

(i) The Special Counsel may as a matter of right intervene or otherwise participate in any proceeding before the Merit Systems Protection Board, except that the Special Counsel shall comply with the rules

of the Board and the Special Counsel shall not have any right of judicial review in connection with such intervention.

* * * *

§ 2302. Prohibited personnel practices

(a) (1) For the purpose of this title, "prohibited personnel practice" means any action described in subsection (b) of this section.

(2) For the purpose of this section—

(A) "personnel action" means—

(i) an appointment;

(ii) a promotion;

(iii) an action under chapter 75 of this title or other disciplinary or corrective action;

(iv) a detail, transfer, or reassignment;

(v) a reinstatement;

(vi) a restoration;

(vii) a reemployment;

(viii) a performance evaluation under chapter 43 of this title;

(ix) a decision concerning pay, benefits, or awards, or concerning education or training if the education or training may reasonably be expected to lead to an appointment, promotion, performance evaluation, or other action described in this subparagraph; and

(x) any other significant change in duties or responsibilities which is inconsistent with the employee's salary or grade level;

with respect to an employee in, or applicant for, a covered position in an agency;

(B) "covered position" means any position in the competitive service, a career appointee position in the Senior Executive Service, or a position in the excepted service, but does not include—

(i) a position which is excepted from the competitive service because of its confidential, policy-determining, policy-making, or policy-advocating character; or

(ii) any position excluded from the coverage of this section by the President based on a determination by the President that it is necessary and warranted by conditions of good administration.

(C) "agency" means an Executive agency, the Administrative Office of the United States Courts, and the Government Printing Office, but does not include—

(i) a Government corporation;

(ii) the Federal Bureau of Investigation, the Central Intelligence Agency, the Defense Intelligence Agency, the National Security Agency, and, as determined by the President, any Executive agency or unit thereof the principal function of which is the conduct of foreign intelligence or counterintelligence activities; or

(iii) the General Accounting Office.

(b) Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority—

(1) discriminate for or against any employee or applicant for employment—

(A) on the basis of race, color, religion, sex, or national origin, as prohibited under section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16);

(B) on the basis of age, as prohibited under sections 12 and 15 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 631, 633a);

(C) on the basis of sex, as prohibited under section 6(d) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(d);

(D) on the basis of handicapping condition, as prohibited under section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791); or

(E) on the basis on marital status or political affiliation, as prohibited under any law, rule, or regulation;

(2) solicit or consider any recommendation or statement, oral or written, with respect to any individual who requests or is under consideration for any personnel action unless such recommendation or statement is based on the personal knowledge or records of the person furnishing it and consists of—

(A) an evaluation of the work performance, ability, aptitude, or general qualifications of such individual; or

(B) an evaluation of the character, loyalty, or suitability of such individual;

(3) coerce the political activity of any person (including the providing of any political

contribution or service), or take any action against any employee or applicant for employment as a reprisal for the refusal of any person to engage in such political activity;

(4) deceive or willfully obstruct any person with respect to such person's right to compete for employment;

(5) influence any person to withdraw from competition for any position for the purpose of improving or injuring the prospects of any other person for employment;

(6) grant any preference or advantage not authorized by law, rule, or regulation to any employee or applicant for employment (including defining the scope or manner of competition or the requirements for any position) for the purpose of improving or injuring the prospects of any particular person for employment;

(7) appoint, employ, promote, advance, or advocate for appointment, employment, promotion, or advancement, in or to a civilian position any individual who is a relative (as defined in section 3110(a)(3) of this title) of such employee if such position is in the agency in which such employee is serving as a public official (as defined in section 3110(a)(2) of this title) or over which such employee exercises jurisdiction or control as such an official;

(8) take or fail to take a personnel action with respect to any employee or applicant for employment as a reprisal for—

(A) a disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences—

(i) a violation of any law, rule, or regulation, or

(ii) mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety,

if such disclosure is not specifically prohibited by law and if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs; or

(B) a disclosure to the Special Counsel of the Merit Systems Protection Board, or to the Inspector General of an agency or another employee designated by the head of the agency to receive such disclosures, of information which the employee or applicant reasonably believes evidences—

(i) a violation of any law, rule, or regulation, or

(ii) mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety;

(9) take or fail to take any personnel action against any employee or applicant for employment as a reprisal for the exercise of any appeal right granted by any law, rule, or regulation;

(10) discriminate for or against any employee or applicant for employment on the basis of conduct which does not adversely affect the performance of the employee or applicant or the performance of others; except that nothing in

this paragraph shall prohibit an agency from taking into account in determining suitability or fitness any conviction of the employee or applicant for any crime under the laws of any State, of the District of Columbia, or of the United States; or

(11) take or fail to take any other personnel action if the taking of or failure to take such action violates any law, rule, or regulation implementing, or directly concerning, the merit system principles contained in section 2301 of this title.

This subsection shall not be construed to authorize the withholding of information from the Congress or the taking of any personnel action against an employee who discloses information to the Congress.

(c) The head of each agency shall be responsible for the prevention of prohibited personnel practices, for the compliance with and enforcement of applicable civil service laws, rules, and regulations, and other aspects of personnel management. Any individual to whom the head of an agency delegates authority for personnel management, or for any aspect thereof, shall be similarly responsible within the limits of the delegation.

(d) This section shall not be construed to extinguish or lessen any effort to achieve equal employment opportunity through affirmative action or any right or remedy available to any employee or applicant for employment in the civil service under—

(1) section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16), prohibiting discrimination on the basis of race, color, religion, sex, or national origin;

(2) sections 12 and 15 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 631, 633a), prohibiting discrimination on the basis of age;

(3) under section 6(d) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(d), prohibiting discrimination on the basis of sex;

(4) section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791), prohibiting discrimination on the basis of handicapping condition; or

(5) the provisions of any law, rule, or regulation prohibiting discrimination on the basis of marital status or political affiliation.

(Added Pub.L. 95-454, Title I, § 101(a), Oct. 13, 1978, 92 Stat. 1114.)

Title 29, United States Code, provides in pertinent part:

§ 633a. Nondiscrimination on account of age in Federal Government employment

(a) Federal agencies affected

All personnel actions affecting employees or applicants for employment who are at least 40 years of age (except personnel actions with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of Title 5, in executive agencies as defined in section 105 of Title 5 (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units in the gov-

ernment of the District of Columbia having positions in the competitive service, and in those units of the legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library of Congress shall be made free from any discrimination based on age.

(b) Enforcement by Equal Employment Opportunity Commission and by Librarian of Congress in Library of Congress; remedies; rules, regulations, orders, and instructions of Commission: compliance by Federal agencies; powers and duties of Commission; notification of final action on complaint of discrimination; exemptions: bona fide occupational qualification

Except as otherwise provided in this subsection, the Equal Employment Opportunity Commission is authorized to enforce the provisions of subsection (a) of this section through appropriate remedies, including reinstatement or hiring of employees with or without backpay, as will effectuate the policies of this section. The Equal Employment Opportunity Commission shall issue such rules, regulations, orders, and instructions as it deems necessary and appropriate to carry out its responsibilities under this section.

* * * *

(c) Civil actions; jurisdiction; relief

Any person aggrieved may bring a civil action in any Federal district court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter.

Title 42, United States Code, provides in pertinent part:

§ 2000e-16. Employment by Federal Government

Discriminatory practices prohibited; employees or applicants for employment subject to coverage

(a) All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of Title 5, in executive agencies as defined in section 105 of Title 5 (including employees and applicants for employment who are paid from non-appropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin.

Enforcement powers of Commission; issuance of rules, regulations, etc.; annual review and approval of national and regional equal employment opportunity plans; review and evaluation of equal employment opportunity programs and publication of progress reports; consultations with interested parties; compliance with rules, regulations, etc.; contents of national and regional equal employment opportunity plans; authority of Librarian of Congress

(b) Except as otherwise provided in this subsection, the Equal Employment Opportunity Commission shall have authority to enforce the provisions of subsection (a) of this section through appropriate

remedies, including reinstatement or hiring of employees with or without back pay, as will effectuate the policies of this section, and shall issue such rules, regulations, orders and instructions as it deems necessary and appropriate to carry out its responsibilities under this section.

* * * *

Civil action by employee or applicant for employment for redress of grievances; time for bringing of action; head of department, agency, or unit as defendant

(c) Within thirty days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection (a) of this section, or by the Equal Employment Opportunity Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex or national origin, brought pursuant to subsection (a) of this section, Executive Order 11478 or any succeeding Executive orders, or after one hundred and eighty days from the filing of the initial charge with the department, agency, or unit or with the Equal Employment Opportunity Commission on appeal from a decision or order of such department, agency, or unit until such time as final action may be taken by a department, agency, or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 2000e-5 of this title, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

Section 2000e-5(f) through (k) of this title applicable to civil actions

(d) The provisions of section 2000e-5(f) through (k) of this title, as applicable, shall govern civil actions brought hereunder.

Government agency or official not relieved of responsibility to assure nondiscrimination in employment or equal employment opportunity

(e) Nothing contained in this Act shall relieve any Government agency or official of its or his primary responsibility to assure nondiscrimination in employment as required by the Constitution and statutes or of its or his responsibilities under Executive Order 11478 relating to equal employment opportunity in the Federal Government.

The Department of the Army Grievance System, C4, AR 690-700, provides in pertinent part:

1-1. PURPOSE

This chapter prescribes Department of the Army grievance procedures for resolving employment dissatisfactions. These procedures give an employee the opportunity to get an objective review of dissatisfactions with any aspect of his or her working conditions, working relationships, or employment status. Matters of employment that may not be grieved under these procedures are discussed in paragraph 1-7*b*.

* * * *

1-6. GRIEVANCE RIGHTS

a. All employees will be treated fairly in all respects. Those who believe they have not been so treated have a right to present their grievances to management officials for prompt consideration and

fair decision. An employee may exercise this right in his or her own behalf or may elect to be accompanied, represented, and advised by a representative of his or her own choosing. (Guidelines on representation are given in para 2-4.) In exercising this right, the employee and his or her representative will be free from restraint, coercion, discrimination, or reprisal.

• • • •

1-7. EMPLOYMENT MATTERS COVERED

a. Except as listed in *b* below, an employee may file a grievance on any matter of concern or dissatisfaction related to his or her employment that is under DA control. Grievances concerning some Department of Defense (DOD) programs covering areas such as DOD-wide career programs and employee parking may also be considered under this chapter.

b. Employees may not file a grievance on the following matters:

(1) The content of published regulations and policy. However, an employee may file a grievance if a local activity's regulations and policies violate those established by higher headquarters.

(2) A decision that can be appealed to the Merit Systems Protection Board (MSPB) or is subject to final administrative review by the Office of Personnel Management (OPM) or the Equal Employment Opportunity Commission (EEOC).

(3) Nonselection from a properly constituted referral list or certificate of candidates → or for failure to receive a non-competitive promotion. ←

(4) A preliminary warning notice of an action that, if effected, would be covered under the grievance system or excluded from coverage by (2) above.

(5) An action that terminates a temporary promotion within 2 years and—

(*a*) Returns the employee to the job from which he or she was temporarily promoted, or

(*b*) Reassigns or demotes the employee to a different job that is not at a lower grade or pay than the job from which the employee was temporarily promoted.

(6) → The content of critical or non-critical elements of an employee's performance standard. ←

(7) Granting or not granting a performance award, quality increase, or honorary award. Adopting or not adopting a suggestion or invention. Granting or not granting an award of the rank of Meritorious or Distinguished Senior Executive.

(8) A merit increase or the lack of a merit increase.

(9) Any termination except a nonpreference eligible Excepted Service employee with → not less than ← 1 year of continuous service.

(10) The performance evaluation of a SES member.

(11) The return of an employee from an initial appointment as a supervisor or manager to a nonsupervisory or nonmanagerial position for failure to satisfactorily complete the probationary period.

(12) → An action covered by AR 604-5. ←

(13) The return of a Senior Executive Service career appointee → to another pay system ← during the 1-year period of probation or for less than fully successful executive performance.

(14) The reassignment of a Senior Executive Service appointee following the appointee's receipt of an unsatisfactory performance rating.

(15) An action taken according to the terms of an agreement voluntarily entered into by an employee that either assigns the employee from one geographic location to another or returns an employee from an oversea assignment.

(16) A matter raised by a bargaining unit employee that is covered by the negotiated grievance procedure.

(17) The return of an employee from a term promotion of more than 2 but not more than 5 years to the job from which promoted or to a different job of equivalent grade and pay.

→(18) Any matter pertaining to the release of information and records from Army files or the Army Privacy Act Program covered by AR 340-17 or AR 340-21.

(19) Any matter which has its own review or appeal procedure stated as part of its regulatory provisions. For example, qualifications disputes under the DOD Priority Placement Program. ←

1-8. RELATIONSHIP TO OTHER APPEAL OR COMPLAINT PROCEDURES

a. →Matters← that can be appealed to the MSPB or are subject to final administrative review by the OPM or the EEOC may not be grieved. →(Allegations of discrimination filed by non-U.S. citizen employees working in the Republic of Panama and paid from appropriated funds are not subject to final administrative review by EEOC and are, therefore, appropriate for consideration under this chap.) ← Employees should be advised of the procedures

and time limits for submitting such appeals and complaints.

b. Complaints, allegations, and reports of official misconduct, mismanagement, waste, fraud, and inefficiency that do not involve personnel relief, → may be submitted to one of the following:

(1) The Army Inspector General complain system, as outlined in AR 20-1, chapter 4.

(2) The DOD Hotline system, as contained in DOD Directive 7050:1; and

(3) The Special Counsel, MSPB, for investigating prohibited personnel practices in accordance with 5 USC 1206.

c. Whenever an employee files a formal grievance that duplicates matters under consideration by another authority (e.g., MSPB or the Special Counsel) or contains issues that will be considered by that authority while ruling on a matter before it, the grievance will be cancelled. After the decision by the other authority, any remaining grievable issues may be presented as a formal grievance within 15 days after the grievance receives the decision. ←

3-1. INFORMAL PROCEDURES

Except as noted in *c* below and paragraphs 3-3 through 3-8, these procedures must be completed before the grievance can progress to the formal procedure.

a. First step.

(1) The employee and his or her representative (if any) present the grievance to the employee's immediate supervisor. Employees must tell the supervisor that their presentations are the first step of the grievance procedure.

• • • •

(3) When the supervisor receives the grievance, he or she will try to resolve it. If the issues raised are outside the supervisor's authority and responsibility, he or she must contact the officials who may be able to help.

(4) If the supervisor cannot resolve the grievance within 10 days of receipt, he or she will tell the employee and the employee's representative by the 10th day of their right to go to the second step. The supervisor must also tell them the time limit (7 days) for submitting the grievance at the second step.

b. Second step.

(1) If the grievance is not resolved in the first step, either the employee or his or her representative must tell the supervisor that the employee wishes to go to the second step. This must be done within 7 days after step one is completed. If the supervisor fails to tell the employee within the 10-day period (*a*(4) above) that the grievance cannot be resolved, the employee can go to the second step on the 11th day.

(2) After being told that the grievance will go to the second step, the supervisor will set up a meeting within 10 days. The meeting will be between the employee, the employee's representative, the supervisor, and the officials (below the commanding officer) who have the authority to decide the matters involved in the grievance. Management may choose to have a technical representative present at the meeting. The officials at the meeting need not be in a command line over the grievant. They may even be in a separate command. However, they must have authority to decide on the matters at issue.

(3) During this meeting, the grievance will be considered informally. However, the official holding

the meeting will prepare a memorandum for record (MFR). The MFR will briefly summarize the grievance, the consideration given it, the conclusions reached, and the course of action decided on during the meeting. All parties will be given a copy of the MFR within 7 days after the meeting is completed.

(4) If an acceptable solution is not reached during the meeting, the MFR will state the employee's right to submit the grievance formally. The MFR will also state the time limits for submitting a formal grievance and to whom it should be addressed.

* * * *

3-2. FORMAL PROCEDURES

a. If a grievance cannot be resolved through the informal procedures or if those procedures have been waived, the employee may submit the grievance in writing. This grievance must explain the issues involved and the relief sought.

(1) The grievance must be submitted within 7 days of receiving the MFR of the informal meeting (para 3-1*b*(3)) or within 7 days of signing the waiver agreement (para 3-1*c*(2)). A formal grievance may also be submitted under the following conditions:

(*a*) If 7 days pass since the second-step meeting and no MFR is received from the official.

(*b*) If 10 days pass since the second-step meeting was requested by the grievant but it was not held.

(2) The employee will submit the grievance to the activity that can grant the relief sought or can recommend that it be granted. (For example, a complaint over inadequate parking from an employee of a tenant activity would be filed with the host activ-

ity for consideration.) The employee will address the grievance to the official who receives and reviews formal girevances on behalf of the activity commander. Generally, the official will be a member of the commander's immediate staff (e.g., deputy commander, chief of staff, executive officer, or civilian personnel officer). The commander is usually not involved at this stage because it would prevent him or her from making a final decision after the grievance is investigated by USACARA. → Whenever USACARA decides that the commander was personally involved in the matter(s) being grieved, it will refer its report to the next higher level. ←

b. The official who receives the grievance will try to resolve it. If it cannot be resolved to the employee's satisfaction within 10 days of its being filed, the official will send it to the appropriate USACARA regional office for investigation and report. (See table 5-2.) If the official is close to resolving the grievance, he or she may continue his or her efforts. However, the official must send the grievance to USACARA after the 10-day period. If the grievance is resolved after an → investigator ← is requested, USACARA must be notified.

* * * *

3-3. PROCEDURES FOR GRIEVANCE INVOLVING RATING, RANKING, AND REFERRAL UNDER DA CAREER PROGRAMS

Grievances alleging improper rating, ranking, and referral at a mandatory referral level under the Army's Career Management Program (AR 690-950 series) will be handled as follows:

a. The employee will submit the written grievance to the individual designated to receive grievances at the activity level. That individual will send

it to the career referral activity at major command or HQDA level, depending upon where the alleged error occurred. The career referral activity in coordination with the Career Program Manager or Functional Chief (or respective representative) will try to resolve the grievance. Within 15 days after receipt of the grievance, the referral activity will send its response through the activity commander to the grievant.

b. If the grievant is not satisfied with the response, he or she must inform the activity commander. This must be done in writing within 7 days of receiving the response. The activity commander will then send the grievance to the proper USACARA regional office.

c. After investigation, USACARA will send its report to the appropriate career referral activity. When decision authority has been delegated, the career referral activity will issue the decision. When decision authority has not been delegated to the career referral activity, the grievance will be sent to the Career Program Manager or Functional Chief (or representative) for issuance of a decision. → If the designated official has been personally involved in the matter grieved, the decision will be made at the next higher level. ← Within 15 days after receipt, the appropriate authority will issue a decision through the activity commander to the grievant.

* * * *

4-1. GENERAL

→ USACARA, with a corps of full-time grievance investigators, ← has been established to assist commanders in decisions on employee grievances. Grievances that reach the formal stage will be referred to USACARA. USACARA will conduct an inquiry

and provide the commander with a report of findings and recommendations. When, in the course of investigation, the USACARA → investigator ← establishes that management has committed a harmful error, USACARA will issue a report of findings and decision. This report is binding on the commander except as noted in paragraph 5-3*d*.

* * * *

4-3. CONDUCTING THE INQUIRY

a. USACARA will designate → an investigator to examine the grievance. The procedures to be employed are solely within the discretion of USACARA. ← This includes—

(1) Determining whether the grievance is acceptable.

(2) Contacting persons mentioned in the grievance who may have information about the issues.

(3) Issuing a report of findings and recommendation or findings and decision.

b. The inquiry may be discontinued due to harmful error. If the grievant asserts that an error occurred that caused substantial harm or prejudice to his or her rights, the → investigator ← must determine whether a harmful error occurred. If a harmful error did occur, the → investigator ← will stop the inquiry, prepare a report of findings and decision on that issue, and send the case to the activity commander with instructions that the → harmful error be corrected. ← USACARA decisions about harmful errors are binding.

c. The → investigator ← will call witnesses who are requested by the grievant → or ← by management if the → investigator ← believes their testimony is needed. The → investigator ← may also call wit-

nesses who were not requested by either party. When the → investigator ← determines that because of distance or similar factors it is impractical to have the witness appear personally, the → investigator ← will decide how best to get the witness' testimony. Witnesses will be treated as follows:

(1) Witnesses who are DA employees will be in a duty and pay status when participating in the inquiry.

(2) Witnesses who are not DA employees may be invited to appear. They will have their transportation costs and per diem paid using volume II of the Joint Travel Regulations. These witnesses cannot be compelled to appear or testify.

(3) Each witness will be told by USACARA that complete testimony is needed and that under DA policy he or she may not be subject to any restraint, coercion, discrimination, or reprisal as a result of such testimony.

d. The → investigator ← will ensure that the activity commander or the commander's representative, the employee, and the employee's representative have → had an opportunity to review the material in the grievance file that was submitted to USACARA (see para 3-2*c*(6)). If, in the judgment of the investigator, the inquiry develops new evidence which the investigator believes might be rebuttable or in need of explanation, the grievant and/or management will be provided an opportunity to provide comments or documents to supplement the grievance file. The USACARA investigator will include in the grievance file all documents and comments which he/she determines are material to the grievance.

e. The investigator will determine the scope and method of the grievance inquiry, the materiality of

evidence, and the contents of the grievance Report of Findings. ←

* * * *

5-1. DECIDING OFFICIAL

Normally, the activity commander who can grant the relief sought in the grievance is the deciding official. However, under unusual circumstances or the special grievance procedures (paras 3-3 through 3-8), a management official other than an activity commander may be the deciding official. The decidinging official, except when the Secretary of the Army, must be at a higher level than any official previously involved in the grievance. → USACARA will refer the report to the next higher level for initial decision when it determines that the activity commander played an integral role in the matter being grieved prior to referral of the grievance to the designated USACARA Regional office. ←

5-2. GRIEVANCE DECISION

Deciding officials must fully and objectively consider the grievance and decide on it fairly. Decisions must be—

a. Based on the facts brought out during the grievance process.

b. Responsive to the employees's allegations, questions, or dissatisfactions.

c. Fully explained in clear terms.

5-3. DECISION ALTERNATIVES

a. When the deciding official accepts the USACARA → investigator's ← recommendations, the official will notify the employee of his or her decision within 15 days of → receipt of the USACARA re-

port by the activity. ← This decision will be final, issued in writing, and cover all recommendations included in the USACARA report. A copy of the USACARA report will be an enclosure to the decision. → The deciding official will send a copy of the decision to the issuing USACARA region within the 15-day time limit for issuing a decision. The employee may not request a further review of the same grievance or any of the issues contained therein. ←

b. The deciding official may decide to grant the personal relief sought by the employee at any time. The deciding official may do so without regard to the recomendations of the USACARA → investigator. ←

c. If the official who would normally make the decision believes that the USACARA findings and recommendations should be rejected, he or she may request → the next higher level to review the report and decide the grievance. Rejection may be for such reasons as new material evidence is available that was not available when the inquiry was conducted; the recommendation involves erroneous interpretation of law or regulation or misapplication of established policy; or the recommendation is of a precedential nature involving a new or unreviewed policy consideration (see AR 10-57. ←Table 5-1 shows examples of referrals for final decisions.

(1) The referring official will send the request to the → higher level within 15 days after receipt of the USACARA report by the activity. ← In the request, the official will explain why he or she believes the USACARA recommendation should be rejected.

(2) The referring official will send a copy of the request for higher level review and the USACARA report to the employee → or ← the employee's rep-

resentative. A copy of the request will also be given to USACARA. The employee may respond to the official's request within 7 days after → receipt. The employee will forward any comments directly to the higher level reviewing authority.

(3) The reviewing official at the higher level will review the file. If it is determined that further investigation is needed, that official will identify the inquiry needed and request USACARA to reopen the case. Requests for further investigation will be dispatched within 15 days of receipt of the grievance at the higher level. If USACARA declines to reopen the case, it will promptly return the file to the higher level for decision. If USACARA reopens the case, it will issue an amended report to the higher level.

(4) The decision by the reviewing official at the higher level will be issued within 30 days of receipt of the referring official's request unless further investigation by USACARA is requested. In that case, the final decision must be issued within 15 days of receipt of either an amended report or a declination to reopen the case. ←

(*a*) The decision will be sent to the grievant through command channels.

(*b*) The decision will be final, issued in writing, and contain findings on all recommendations in the USACARA report.

(*c*) The employee may not request a further review of the same grievance.

→ (*d*) A copy of the decision will be sent to the appropriate USACARA Regional Office. ←

d. When a commander receives a USACARA report that he or she believes, based on competent legal advice, would cause or be a violation of law, the com-

mander should immediately contact the appropriate USACARA office to reopen the case.

e. If the deciding official does not issue a decision on an employee's grievance within the time limits cited in *a* and *c*(4) above → or forward the grievance within the time limits cited in *c*(1) and *c*(3), the recommendations of the USACARA investigator will become the final decision. The latter transmitting the grievance file to the grievant will advise that by default the USACARA recommendation has become binding and is the final decision in the grievance.

* * * *

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 82-0491-C(5)

ELISE D. MCINTOSH, *et al.*
Plaintiffs,

v.

CASPAR W. WEINBERGER, *et al.*,
Defendants.

OFFER TO STIPULATE FACTS

The defense hereby offers to stipulate that the following facts are true:

1. In June, 1981, Mr. Francis ("Bud") Steins and Ms. Valada Henson, two Management-Employee Relations Specialists at the TSARCOM CPO, evaluated the qualifications of the applicants under JOAs 81-17 and 81-24, using the same application documents and X-118 qualifications standards that had previously been used to rate the applicants in the original selection action under these two JOAs.

2. Mr. Steins and Ms. Henson determined that, in their opinion, only Ms. Young, Ms. Sorrells, and Ms. Kennedy were minimally qualified under the OPM X-118 standards for the position of Management Analyst, GS-7 optimum GS-9. The remainder of the applicants under JOA 81-17, including Ms. Wind, Ms. McNeill, Ms. Mest, and Ms. Vierdag, were found not minimally qualified by Mr. Steins and Ms. Henson.

3. Mr. Steins and Ms. Henson determined that, in their opinion, Ms. Sorrells, Ms. Janice Mattics, Ms. Milda Thomasson, and Mr. Joe Klein were minimally qualified under the OPM X-118 standards for the position of Management Analyst, GS-9 optimum GS-11. The remainder of the applicants under JOA 81-24, including Ms. Young and Ms. Carver, were found not minimally qualified by Mr. Steins and Ms. Henson.

4. On June 17, 1981, Mr. Steins and Ms. Henson submitted the applications of the individuals they found minimally qualified to an "ad hoc" panel of three (3) subject-matter experts in the management analyst field, Mr. Carl Dieterle, Mr. Richard Ensminger, and Ms. Jeane Rohner. Ms. Elizabeth Sappington was the union observer on this panel, and Mr. Joseph T. McKinley was the EEO representative.

5. This panel determined that, in their opinion, Ms. Young, Ms. Sorrells, and Ms. Kennedy were "Best Qualified" for the GS-7 optimum GS-9 position and Ms. Sorrells, Ms. Mattics, Ms. Thomasson and Mr. Klein were "Best Qualified" for the GS-9 optimum GS-11 position.

6. In reaching this determination, the panel used the same credit rating plan used by the original panels under JOAs 81-17 and 81-24. Under this plan, each candidate's training and experience (TRAEX) and their supervisory appraisals were rated on a 4-point scale, with the TRAEX score weighted 75% to 25% for the supervisory appraisal score.

7. On this scale, Ms. Sorrells and Ms. Kennedy each scored 116.0, while Ms. Thomasson scored 14.50 and Mr. under the GS-7 optimum GS-9 rating plan. On the GS-9 optimum GS-11 rating, Ms. Sorrells and Ms. Mattics each scored 1116.0, while Ms. Thomasson scored 14.50 and Mr. Klein scored 12.0.

8. No referrals or selections were ever made using these ratings and ranking panel results.

Respectfully submitted,

THOMAS E. DITTMEIER
United States Attorney

By: /s/ John Paul Woodley, Jr.
JOHN PAUL WOODLEY, JR.
Department of the Army
Civilian Personnel Litigation
Attorneys for Defendants

Copy of the foregoing hand-delivered
to Mr. Louis Gilden, Attorney for
Plaintiffs, this 4th day of August, 1984

No. 87-174

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

EDWARD O. TURNER,
Petitioner,

VS.

ELISE D. MCINTOSH, SUSAN C. SORRELLS, ODESSA HOLLIS, ANN E. KENNEDY, JOANN SCHERBRING, CASPAR WEINBERGER, Secretary of Defense, and JOHN O. MARSH, JR., Secretary of the Army,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

LOUIS GILDEN
Counsel of Record
317 North 11th Street, Suite 1220
St. Louis, Missouri 63101
(314) 241-6607

Counsel for Respondents
Elise D. McIntosh,
Susan C. Sorrells,
Odessa Hollis,
Ann E. Kennedy, and
JoAnn Scherbring

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

QUESTIONS PRESENTED

1. Is a *Bivens* action against a federal personnel officer who destroyed the records of a reconstruction of a promotion action and failed to report the results to national headquarters, records which showed that the persons actually selected for promotion were not qualified and that the plaintiffs in the action should have been referred as best qualified, precluded under *Bush v. Lucas,* 462 U.S. 367 (1983), *Brown v. G.S.A.,* 425 U.S. 820 (1976), or *Carlson v. Green,* 446 U.S. 142 (1980)?

2. May a *Bivens* action asserting a violation of the Fifth Amendment be predicated either upon the theory that federal employees have a property interest in their EEO claims such that destruction of evidence central to their claims and not available elsewhere deprived them of due process, or upon the theory that career federal employees in the non-excepted service have a property interest in their agency's merit-promotion system and a legitimate expectation that their applications for promotion will be fairly judged on the merits, such that destruction of records adverse to the agency, and concealment of the adverse results from higher authority, violated due process?

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Contents	iii
Table of Authorities	iv
Statement of the Case	2
Reasons for Denying the Writ	3
I. The decision below does not conflict with either *Bush v. Lucas,* 462 U.S. 367 (1983) or *Parratt v. Taylor,* 451 U.S. 527 (1981), it was a correct decision, and does not merit review by this Court	4
II. The Eighth Circuit did not misapply the standards for qualified immunity, and the question of qualified immunity is not before the Court	9
III. The Eighth Circuit properly found that plaintiffs had proven the element of causation, and the question of causation is not before the Court on the questions presented by petitioner	12
Conclusion	13

TABLE OF AUTHORITIES

Page

Cases:

Anderson v. Creighton, 483 U.S. ____, 107 S.Ct. 3034 (1987) 10

Bartel v. Federal Aviation Administration, 725 F.2d 1403 (D.C. Cir. 1984) 5

Beitzell v. Jeffrey, 643 F.2d 870 (1st Cir. 1981) 10

Biddle v. U.S., 602 F.2d 441 (D.C. Cir. 1979) 7

Bigby v. City of Chicago, 766 F.2d 1053 (7th Cir. 1985), *cert. denied,* 474 U.S. 1056 (1986) 10

Birnbaum v. United States, 588 F.2d 319 (2nd Cir. 1978) 8

Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971) ..... i, 3, 9, 11

Borrell v. United States International Communications Agency, 682 F.2d 981 (D.C. Cir. 1982)..... 5, 8

Brown v. G.S.A., 425 U.S. 820 (1976) i

Bush v. Lucas, 462 U.S. 367 (1983)..... i, 3, 4, 5, 6, 9

Carlson v. Green, 446 U.S. 14 (1980)..... i

Doe v. United States Department of Justice, 753 F.2d 1092 (D.C. Cir. 1985) 5

Dreher v. United States Postal Service, 711 F.2d 907 (9th Cir. 1983) 7

Egger v. Phillips, 710 F.2d 292 (7th Cir. 1983), *cert. denied,* 464 U.S. 918 (1983) 6

Goodisman v. Lytle, 724 F.2d 818 (9th Cir. 1984) 10

Harlow v. Fitzgerald, 457 U.S. 800 (1982) 9

Hudson v. Palmer, 468 U.S. 517 (1984) 9

Laswell v. Brown, 683 F.2d 261 (8th Cir. 1982), *cert. denied,* 459 U.S. 1210 (1983) 8

Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982) .. 9, 10

Mitchell v. Forsyth, 472 U.S. 511 (1985) 9, 11

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) 10

Parratt v. Taylor, 451 U.S. 527 (1981) 4, 9

Perry v. Sinderman, 408 U.S. 593 (1972) 10

Ray v. Nimmo, 704 F.2d 1480 (11th Cir. 1983) 6

Reuber v. United States, 750 F.2d 1039 (D.C. Cir. 1985) 6

Williams v. Department of the Army, 651 F.2d 243 (4th Cir. 1981) 7

Williams v. Internal Revenue Service, 745 F.2d 702 (D.C. Cir. 1984) 5, 8

Statutes and Regulations:

5 U.S.C. §1206, *et seq.* 8

5 U.S.C. §7501, *et seq.* 3

5 U.S.C. §7512 7

28 U.S.C. §1346(b) 8

Army Regulation 690-700 *et seq.* 7

Statement of Policy Concerning Indemnification of Department of Justice Employees, 51 Fed. Reg. 27,021 11

No. 87-174

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

EDWARD O. TURNER,

Petitioner,

vs.

ELISE D. MCINTOSH, SUSAN C. SORRELLS, ODESSA HOLLIS, ANN E. KENNEDY, JOANN SCHERBRING, CASPAR WEINBERGER, Secretary of Defense, and JOHN O. MARSH, JR., Secretary of the Army,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

Respondents Elise D. McIntosh, Susan C. Sorrells, Odessa Hollis, Ann E. Kennedy, and JoAnn Scherbring, respectfully request that this Court deny the petition for writ of certiorari, seeking review of the Eighth Circuit's opinion in this case. That opinion is reported at 810 F.2d 1411 (1987) (App. 1a-45a).[1]

---

[1] "App." refers to the Appendix to the Petition For A Writ Of Certiorari; "Tr." refers to the Transcript of the jury trial in this matter. "Pet." refers to the Petition For A Writ of Certiorari filed by Edward Turner. Respondents have not filed a separate appendix to this brief in opposition.

STATEMENT OF THE CASE

Respondents incorporate by reference the statement of facts in the opinion below (App. 3a-14a). Additional facts are noted here to correct inaccuracies and omissions in the petition.

Petitioner, Edward Turner, recites the evidence he presented at trial that he set aside the Steins-Henson reconstruction results on the promotion actions because Steins and Henson had exceeded what he had asked them to do. (Pet.3) The appeals court's opinion notes that the jury heard the testimony of plaintiff's expert witness, former OPM employee, Chris Kunz, that the term "reconstruct" had a generally accepted meaning in the federal personnel field, and that it meant that both the minimum qualification determination and the rating-and-ranking phase were to be redone. (App. 10a) The evidence indicated that Steins and Henson performed the task that they were intended to perform.

In addition, the jury heard testimony from Steins and Henson, the personnel employees who conducted the reconstruction, that the members of the rating and ranking panel in question were not contacted or recruited by either of them. (Tr. 2-42, 71) Members of the panel testified that they were called upon by their supervisors or by the personnel office to sit on the panel. (Tr. 2-88, 95, 100, 118, 129-30) Turner therefore set aside, concealed, and destroyed the results of a reconstruction action that his personnel office staff had helped to set up, and he then had another group including himself do an evaluation of the selections, in which the original selections were rubber-stamped. As a result of his actions, the government officers in Virginia received a report that was false, for it excluded the information contained in the destroyed records.

Petitioner's statement of the case also omits reference to the series of requests by the plaintiffs' union representative for the results of the Steins Henson reconstruction, some of which were

made prior to the shredding of the documents, and to which the agency made misleading responses. (App. 11a-12a)

The testimony of witnesses to the Steins-Henson reconstruction was that none of the persons actually selected for promotion were rated even minimally qualified. Plaintiffs Sorrells, Kennedy, and McIntosh, it was recalled at trial, were found in the reconstruction to be best qualified, indicating that their names should have been referred to the selecting supervisors, while no one recalled the Steins-Henson reconstruction results for plaintiffs Hollis and Scherbring. (App. 12a)

REASONS FOR DENYING THE WRIT

This Court held in *Bush v. Lucas,* 462 U.S. 367 (1983), that federal employees who are removed or demoted in violation of their constitutional rights are restricted to the remedies available to them under the civil service statutes, and that the Court would not authorize a damages action for such employees under the First Amendment as it had under the Fourth Amendment in *Bivens v. Six Unknown Federal Narcotics Agents,* 403 U.S. 388 (1971). Justice Marshall, joined by Justice Blackmun, stated in a concurring opinion in *Bush:* "... [T]here is nothing in today's decision to foreclose a federal employee from pursuing a Bivens remedy where his injury is not attributable to personnel actions which may be remedied under the federal statutory scheme." *Id.,* at 391.

This case falls precisely within the language of Justice Marshall's concurring opinion in *Bush,* as it involves the denial of promitions, which is not a matter which could be appealed to the Merit Systems Protection Board under the Civil Service Reform Act of 1978, 5 U.S.C. §7501 et seq.

Contrary to the petitioner's assertions, therefore, the holdings of the lower courts here are not in conflict with *Bush v. Lucas,* and certiorari is not warranted on that basis. Moreover, the other reasons urged for granting the writ assert that the deci-

sion below is erroneous, and should be reviewed by this Court, on grounds which petitioner has not included in his questions presented, and for that reason and because the points lack merit the granting of certiorari to review the decision below would be unwarranted.

I. The Decision Below Does Not Conflict With Either *Bush v. Lucas*, 462 U.S. 367 (1983) Or *Parratt v. Taylor*, 451 U.S. 527 (1981), It Was A Correct Decision, And Does Not Merit Review By This Court.

This Court's decision in *Bush* involved a suit brought by a federal employee who was demoted, allegedly in retaliation for the exercise of First Amendment rights, and who had also taken an appeal to the Federal Employee Appeals Authority, *Id.*, at 370. The Civil Service Commission's Appeals Review Board ultimately reviewed the case, *Id.*, at 371, and ordered that the employee be reinstated in his former position and given back pay of approximately $30,000. The employee argued that he should also be permitted to pursue a cause of action under the First Amendment because the Civil Service remedies afforded to him were inadequate by comparison with a jury trial for damages. The Court, upon extensive examination of the statutory and regulatory scheme permitting federal employees to appeal from demotions or removals, *Id.*, at 659-664, disagreed.

Petitioner here draws from the holding in *Bush* a much broader proposition, that federal employees are precluded by the existence of civil service remedies for some wrongs from bringing suit against federal supervisory employees for violations of any constitutional rights, regardless of whether or not Congress has provided a remedy for the wrong at issue. (Pet. at 10) Petitioner would have this Court hold that even where Congress has not provided a federal employee with a remedy against unlawful conduct, the wrong should go without a

remedy.[2] Such a result is not required by *Bush*, as the 8th Circuit held. (App. 40a-42a)

Other courts have declined to hold that *Bush* precludes all constitutional tort claims by federal employees. In *Williams v. Internal Revenue Service*, 745 F.2d 702, 705 (D.C. Cir. 1984), the D.C. Circuit declined to hold that *Bush* disposed of a federal employee's First Amendment claim where the employee had no civil service remedy. The D.C. Circuit relied on the pre-*Bush* case of *Borrell v. United States International Communications Agency*, 682 F.2d 981 (D.C. Cir. 1982). *Borrell* held that civil service procedures did not supplant a probationary federal employee's First Amendment claim because the civil service statute did not protect probationary employees. In *Doe v. United States Department of Justice*, 753 F.2d 1092 (D.C. Cir. 1985) the D.C. Circuit declined to dismiss a federal employee's *Bivens* action. The court noted, "*Bush* held only that where civil servants enjoy meaningful *and constitutionally adequate, see Bush,* 103 S.Ct. 2411 n.10, statutory remedies for first amendment violations, federal courts should not imply an additional *Bivens*-type *damages remedy* under the constitution. The *Bush* holding in no way affects the scope of constitutional rights...." *Doe* at 1109, n.17.

In another case, *Bartel v. Federal Aviation Administration*, 725 F.2d 1403 (D.C. Cir. 1984), the D.C. Circuit reversed the district court's dismissal of the federal employee's due process claims, holding, "The district court ... must entertain Bartel's due process claims for damages attributable to wrongful conduct for which that scheme [appeal to the MSPB] provides no remedy, along with those for injunctive relief." *Id.*, at 1415. In

---

[2] See *Bush, supra,* at 378 n.14: "We need not reach the question whether the Constitution itself requires a judicially-fashioned damages remedy in the absence of any other remedy to vindicate the underlying right, unless there is an express textual command to the contrary. Cf. Davis v. Passman, supra [442 U.S. 228] at 246 [(1979)]..."

so holding, the D.C. Circuit relied on Justice Marshall's concurring opinion in *Bush*. *Id.*.

In a case brought under a governmental action theory against a private employer closely involved with the federal government, the D.C. Circuit has held that a *Bivens* remedy for constitutional torts is not barred by *Bush*. *Reuber v. United States*, 750 F.2d 1039, 1058 (D.C. Cir. 1985). The court discussed in detail and rejected the argument that *Bush* operates to preclude a remedy in the federal employment context where the employee has no other remedy. *Id.*, at 1058-59.

Several cases decided before *Bush* anticipated, and rejected, the type of broad preclusion argument made by Turner here. *Egger v. Phillips*, 710 F.2d 292, 298 (7th Cir. 1983) *cert. denied*, 464 U.S. 918 (1983) ("to the extent that *Bush* [598 F.2d 958 (5th Cir. 1979)] posits that the rights of federal employees *qua* employees are coterminus with the administrative protections afforded by Congress, we reject it"); *Ray v. Nimmo*, 704 F.2d 1480, 1486 (11th Cir. 1983) (pre-*Bush* decision remanding employee's due process claim for the reason that she may not have had access to an administrative remedy because of her unique employment position).

This is a case in which a federal personnel official committed a shocking act of destruction and concealment of information. petitioner argues that the plaintiffs' pursuit of EEO claims against the selecting supervisors was an adequate remedy for the wrong done by Turner. However, plaintiffs never claimed that Turner's actions were racially discriminatory or in retaliation for the filing of EEO claims, but rather asserted that Turner acted, in the words of the court of appeals, "out of a bureaucratic desire to squelch charges that ALMSA employees had not done their duty." (App. 41a) The jury accepted the plaintiffs' theory that Turner's concealment of the Steins-Henson reconstruction results undermined the procedural protections which the reconstruction was intended to provide (App. 39a) and that the

plaintiffs were thereby injured. Neither this reconstruction, nor Turner's conduct, had anything to do with the discrimination claims or with the EEO process, other than the evidence the reconstruction would have provided of the relative qualifications of the plaintiffs and the selectees. The existence of an EEO remedy for the denial of the promotions, therefore, is not a remedy for the wrongs done by Turner, as the wrongfulness of his conduct was separate and apart from that of the selecting supervisors who selected young white women for all of the positions.

The other purported remedies petitioner refers to were unavailable to the plaintiffs. The demotion in *Bush* was an action appealable to the Merit Systems Protection Board under 5 U.S.C. §7512, which applies to a removal, a suspension for more than fourteen days, a reduction in grade, and a furlough of thirty days or less. *Bush, supra,* at 381-388. Here, by contrast, Turner's action against plaintiffs was not appealable to the MSPB because it is not an adverse action within the definition of 5 U.S.C. §7512. Destruction of records is not one of the actions ennumerated in the statute. Denial of a promotion is also not an adverse action within the jurisdiction of the MSPB. *Williams v. Department of the Army,* 651 F.2d 243 (4th Cir. 1981). *See also, Biddle v. United States,* 602 F.2d 441 (D.C. Cir. 1979) and *Dreher v. United States Postal Service,* 711 F.2d 907, 909 (9th Cir. 1983), both discussing the limits of MSPB jurisdiction.

An administrative grievance under Army Regulation 690-700 (App. 89a) was not available to the plaintiffs, primarily because they were members of the union bargaining unit (AR 690-700, 1-7.b.(16), App. 92a); it would also have been unavailable because the matter arguably involved "non-selection from a properly constituted referral list or certificate of candidates" (AR 690-700, 1-7.b.(3), App. 90a), and because the matter of improprieties in the agency's merit selection process was a matter subject to the final administrative review of OPM (AR 690-700, 1-7.b.(2), App. 90a).

The option of a suit under the Federal Tort Claims Act, 28 U.S.C. §1346(b), mentioned briefly by petitioner, was never raised below. More importantly, though, a claim under the FTCA was not available because the government is immune to suit under a *Bivens* theory. *Laswell v. Brown,* 683 F.2d 261, 268 (8th Cir. 1982) *cert. denied,* 459 U.S. 1210 (1983) (citing *Bivens, supra,* 403 U.S. at 410). In addition, claims under the FTCA must have a basis in state tort law, and *Bivens* actions arising under the Constitution do not fall within the FTCA. *Birnbaum v. United States,* 588 F.2d 319, 327-28 (2nd Cir. 1978).

The option of filing a complaint to the Special Counsel of the Merit Systems Protection Board is not a remedy for a federal employee who has been wronged by unlawful action taken in connection with a promotion, because prosecuting such a complaint is not a matter of right for the employee. While the Special Counsel is obligated to accept a complaint and investigate it to some degree, 5 U.S.C. §1206 (a)(1) (App. 74a), any further action by the Special Counsel is discretionary and is not within the control of the employee. 5 U.S.C. §1206 (a)(3)(A) (App. 74a); 5 U.S.C. §1206 (c)(1)(A) and (B) (App. 76a). The existence of the MSPB Special Counsel has specifically been held not to bar a *Bivens* action because of the discretionary nature of any action by the Special Counsel and because the injured employee is not a party to the action. *Borrell v. United States International Communications Agency,* 682 F.2d 981 (D.C. Cir. 1982). *Borrell* has been cited and relied upon in a post-*Bush* decision of the D.C. Circuit. *Williams v. Internal Revenue Service,* 745 F.2d 702, 705 (D.C. Cir. 1984).

The argument that this case presents a mere evidentiary issue, for which the application of an evidentiary presumption would be an adequate remedy (Pet. 12-13) misses the point. An evidentiary presumption must be applied within the context of a legal proceeding, and a presumption against Turner would not necessarily be permitted against the agency or the selecting officials. The wrongful actions of Turner and of the selecting

supervisors were separate acts, although Turner's conduct clearly was viewed by the jury as a cover-up of wrongful conduct by other agency employees. Moreover, this argument attempts to trivialize conduct which the jury found to be substantial, as evidenced by the size of the jury's verdict.

Finally, petitioner argues that the result here conflicts with *Parratt v. Taylor,* 451 U.S. 527 (1981) and *Hudson v. Palmer,* 468 U.S. 517 (1984). Petitioner fails to indicate what state tort remedies for Turner's conduct were available, however, making this argument a mere watered-down repetition of his point under *Bush v. Lucas, supra,* above.

II. The Eighth Circuit Did Not Misapply The Standards For Qualified Immunity, And The question Of Qualified Immunity Is Not Before The Court.

In order for a *Bivens* claim to exist, deprivation of a constitutionally protected right must exist. Whether or not the right was clearly established at the time of the alleged wrongful conduct is relevant to the question whether a government official sued in his individual capacity is entitled to qualified immunity from suit, a question of law which can be determined prior to trial. *Mitchell v. Forsyth,* 472 U.S. 511, 105 S. Ct. 2806 (1985). If, however, the right in question is found by the trial court to have been clearly established at the time of the conduct, then the defendant is not entitled to dismissal prior to trial, and, absent prevailing in an immediate appeal, must rely upon presenting evidence of the reasonable nature of his conduct to the trier of fact in order to sustain the defense. *Mitchell, supra,* at 526-28. Here, the district court found a clearly established right under *Logan v. Zimmerman Brush Co.,* 455 U.S. 422 (1982), and moreover, found that Turner's duties were ministerial and not discretionary under *Harlow v. Fitzgerald,* 457 U.S. 800 (1982). The court of appeals did not rely upon ministerial/discretionary distinctions (App. 34a-35a). The Court of Appeals held that the rights in question were clearly established under the theory of a

property interest in EEO claims, relying on *Logan, supra,* and *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306 (1950) and under the alternative theory that the plaintiffs had a clearly established right to have their applications for promotion considered on a merit basis, relying upon the body of statutes and regulations governing the promotions here and *Perry v. Sinderman,* 408 U.S. 593, 602 (1972). The court of appeals stated, in holding that Turner was not entitled to qualified immunity: "We do not think it could be seriously argued that the fundamental unfairness of such a subversion of the whole process would not have been clear to a reasonable person in Turner's position." (App. 39a) The court of appeals' decision was correct.

The Eighth Circuit's analysis in *Anderson v. Creighton,* 483 U.S. ____, 107 S.Ct. 3034 (1987), has no relation to the questions presented for review here. *Anderson* involved a *Bivens* action against an F.B.I. agent and the standards of reasonableness to be considered with regard to qualified immunity. Petitioner's suggestion that the Eighth Circuit's reasoning was facile in that case and facile here is unworthy of consideration as a reason for granting certiorari.

The cases petitioner cites for the proposition that "a government employee does not acquire Constitutionally-protected rights in promotion merely because the Government promulgates guidelines and procedures for selecting among candidates," *Bigby v. City of Chicago,* 766 F.2d 1053, 1056-57 (7th Cir. 1985), *cert. denied,* 474 U.S. 1056 (1986), *Goodisman v. Lytle,* 724 F.2d 818, 820-21 (9th Cir. 1984); and *Beitzell v. Jeffrey,* 643 F.2d 870, 876 (1st Cir. 1981), do not stand for a general proposition that a government employee never has a protected property interest arising from promotion procedures. Each holds that in the specific context at issue, that of Chicago police officers taking a civil service exam, of a university professor seeking tenure, and that of an assistant professor denied tenure, such a protected property interest did not exist. No

court that respondents are aware of has held that a federal employee does *not* have a property interest arising from federal merit promotion procedures.

In addition, petitioner has failed to raise the issue of qualified immunity in the questions he has presented to the Court; to then suggest that there is a basis for review in the lower court's determination of that issue makes little sense. The matter of qualified immunity was presented to the district court on a motion for summary judgment, which was denied, and was then presented to the jury, the procedure this Court suggested in *Mitchell, supra,* at 527; the jury rejected the defense and that has been affirmed on appeal. Thus no question for review by this Court is presented.

Petitioner also presents a "floodgate" argument in support of this Court granting review, suggesting that *Bivens* actions are being filed at a rate of 1,000 per year and suggesting that the number of suits filed shows the need for additional limitations. Petitioner does not suggest how many of these suits involve federal employees as plaintiffs. However, other data suggests that existing procedural and substantive limitations on a plaintiff's rights are in fact having a very substantial effect.

In July, 1986, when the Department of Justice issued its Statement of Policy Concerning Indemnification of Department of Justice Employees, 51 Fed. Reg. 27,021, the department stated that only 32 adverse judgments against individual federal employees had occurred since the decision in *Bivens. Id.,* at 27,022. Respondents are not aware whether the present case was included in that figure, but in any case, the number of federal employees with *Bivens* claims who have ultimately prevailed is extremely low, suggesting that additional restrictions are not needed. There is a vast difference between the mere filing of a claim, the figure petitioner offers, and prevailing on the merits.

Petitioner offers the spectacle of disgruntled, vindictive persons acting as private attorneys-general causing vexation to federal officials, and suggests that where great loss to the government caused by an official, some internal action will be taken to discipline the official. However, the jury found, and the appeals court here affirmed, that real, substantial loss was caused to the plaintiffs. The jury did not view plaintiffs as vindictive or disgruntled. Disciplinary action against Edward Turner may satisfy the government's interests in reducing its future losses from similar conduct, but would in no way compensate the victims of Turner's cover-up.

III. The Eighth Circuit properly found that plaintiffs had proven the element of causation, and the question of causation is not before the Court on the questions presented by petitioner.

Petitioner's final point suggests that review by this Court is warranted because, it is claimed, the courts below erred in finding that plaintiffs had adequately proven causation. Mere error in the decision below, even if it were present, would not support review by this Court. The point is not among those presented for review, and petitioner's causation argument was fully considered and rejected by the Court of Appeals. (App. 42a-43a) In addition, the suggestion that the district court's judgment for the defendants on the discrimination claims shows that the plaintiffs were not entitled to the promotions sought is a distortion; the district court held that the plaintiffs had not proven that they were discriminated against on the basis of race and national origin, and did not decide the abstract question whether the plaintiffs should have been promoted. Moreover, the jury was instructed that in order to find for the plaintiffs, it must find that the plaintiffs were better qualified, and it did so find, a finding which, plaintiffs have argued in their cross-petition, should have been determinative on the question of pretext on the Title VII claims.

The judgment against Edward Turner here is not a matter for surprise or dismay, but rather indicates that the judicial processes are functioning as they should. Turner's conduct was outrageous, and the jury so found. This case is not one involving an extension of any existing legal principles, nor is there any conflict between the decision here and any decisions of the Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

LOUIS GILDEN
317 North 11th Street, Suite 1220
St. Louis, Missouri 63101
(314) 241-6607

Counsel for Respondents
Elise D. McIntosh,
Susan C. Sorrells,
Odessa Hollis,
Ann E. Kennedy, and
JoAnn Scherbring

Supreme Court, U.S.
FILED
SEP 17 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-174

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

EDWARD O. TURNER,
Petitioner,

v.

ELISE D. MCINTOSH, SUSAN C. SORRELLS, ODESSA HOLLIS, ANN E. KENNEDY, JOANN SCHERBRING, CASPAR W. WEINBERGER, Secretary of Defense, and JOHN O. MARSH, JR., Secretary of the Army,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

REPLY OF PETITIONER TO BRIEF IN OPPOSITION

WALTER H. FLEISCHER
Counsel of Record
ISAAC N. GRONER
COLE AND GRONER, P.C.
1615 L Street, N.W.
Washington, D.C. 20036-5602
(202) 331-8888
Counsel for Petitioner

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF AUTHORITIES

Cases: Page

Atlantic Richfield Co. v. U.S. Dept. of Energy, 769 F.2d 771 (D.C. Cir. 1984) ---- 3
Bivens v. Six Unknown Narcotics Agents, 403 U.S. 388 (1971) ---- 2
Bush v. Lucas, 462 U.S. 367 (1983) ---- 2
Callahan v. Schultz, 783 F.2d 1543 (11th Cir. 1986) ---- 3
Cornelius v. Nutt, 472 U.S. 648 (1985) ---- 2
Cuyler v. Sullivan, 446 U.S. 335 (1980) ---- 3
International Union (UAW) v. N.L.R.B., 459 F.2d 1329 (D.C. Cir. 1972) ---- 3
Procunier v. Navarette, 434 U.S. 555 (1978) ---- 3
United States v. Mendenhall, 446 U.S. 544 (1980) ---- 3

Statutes, Regulation and Rule:

5 U.S.C. § 7121 ---- 2
42 U.S.C. § 1983 ---- 3
The Department of the Army Grievance System C4, AR 690-700 ---- 1
Supreme Court Rule 21.1.(a) ---- 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-174

EDWARD O. TURNER,

Petitioner,

v.

ELISE D. MCINTOSH, SUSAN C. SORRELLS, ODESSA HOLLIS, ANN E. KENNEDY, JOANN SCHERBRING, CASPAR W. WEINBERGER, Secretary of Defense, and JOHN O. MARSH, JR., Secretary of the Army,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

REPLY OF PETITIONER TO BRIEF IN OPPOSITION

Two contentions in the Brief in Opposition require a short reply.

1. In arguing that grievance review under Army Regulation 690-700 was unavailable, Respondents[1] offer a number of reasons which in fact only emphasize the existence of available remedies, and also illustrate the invalidity of the entire notion that Turner's conduct could

---

[1] "Respondents" refers to those who were Plaintiffs below.

be treated as giving rise to a claim so severable from its personnel context that it could be remedied only by sanctioning a *Bivens* suit. Respondents point first to an alleged exception for "members of the union bargaining unit" (br. in opp. 7),[2] and then to an exception for matters subject to the final administrative review of the Office of Personnel Management ("OPM") (*id.*). But their argument only underlines the pervasiveness of remedies available in this sphere of personnel law, and the fact that Respondents' claims are necessarily covered by either the Army grievance regulations or parallel collective bargaining agreement remedies established under 5 U.S.C. § 7121,[3] and/or OPM procedures. That the panoply of potential remedies may be even more extensive than those discussed in the Petition (pp. 11-12) only renders the creation of *Bivens* remedies all the less explicable, and all the more clearly violative of *Bush* v. *Lucas*, 462 U.S. 367 (1983), and the other rulings of this Court relied on in the Petition.

Finally, Respondents contend that the Army grievance procedure was "unavailable because the matter arguably involved 'non-selection from a properly constituted referral list or certificate of candidates'" (br. in opp. 7). But Respondents' position below was that the list was *im*properly constituted, and that Turner precluded an appropriate reconstituting of a proper list. Those claims are obviously not within the exclusion for grievance coverage they cite.

Plaintiffs acknowledge that this case "involves the denial of promitions [*sic*]" (br. in opp. 3), and that there is "an EEO remedy for the denial of the promotions" (*id.* at 7). Turner's conduct, they contend, affected the

---

[2] Actually the exception is for "(16) A matter raised by a bargaining unit employee that is covered by the negotiated grievance procedure" (Pet. App. 92a).

[3] *See generally Cornelius* v. *Nutt*, 472 U.S. 648, 657-659 (1985).

evidence of the relative qualifications of the Plaintiffs and the selectees which in turn impacted their discrimination claims and the EEO process (*id.*). The entire Cross-Petition (O.T. 1987, No. 87-377) is based on the overlap of issues between the discrimination claim and the claim against Turner. In all justice and reality, the purported schism relied on in the Brief in Opposition is nothing more than artful pleading. The short of this case is that there were other remedies, for example invocation of adverse inferences in the EEO process itself,[4] as well as the others mentioned in the Petition and above, for Turner's alleged conduct.

2. Respondents' contention that the qualified immunity questions are not properly before the Court because of the phrasing of the Questions Presented is put to rest by *Procunier* v. *Navarette*, 434 U.S. 555, 559-560 n.6 (1978). This Court there held that, for purposes of its Rules (now Rule 21.1.(a)), such immunity issues were fairly comprised within questions presented related to whether certain official actions raised Constitutional claims covered by 42 U.S.C. § 1983, and noted that "[i]n any event, our power to decide is not limited by the precise terms of the question presented." *See also United States* v. *Mendenhall*, 446 U.S. 544, 551-552 n.5 (1980); *Cuyler* v. *Sullivan*, 446 U.S. 335, 342-343 n.6 (1980).

The Opposition cannot withstand analysis.

---

[4] In addition to the authorities noted in the Petition at p. 12 n.4, *also cf., e.g., Callahan* v. *Schultz*, 783 F.2d 1543 (11th Cir. 1986); *Atlantic Richfield Co.* v. *U.S. Dept. of Energy*, 769 F.2d 771, 794 (D.C. Cir. 1984); *International Union (UAW)* v. *N.L.R.B.*, 459 F.2d 1329 (D.C. Cir. 1972).

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

WALTER H. FLEISCHER
Counsel of Record
ISAAC N. GRONER
COLE AND GRONER, P.C.
1615 L Street, N.W.
Washington, D.C. 20036-5602
(202) 331-8888
Counsel for Petitioner